AGREED RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 253.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, PLAINTIFF IN ERROR,

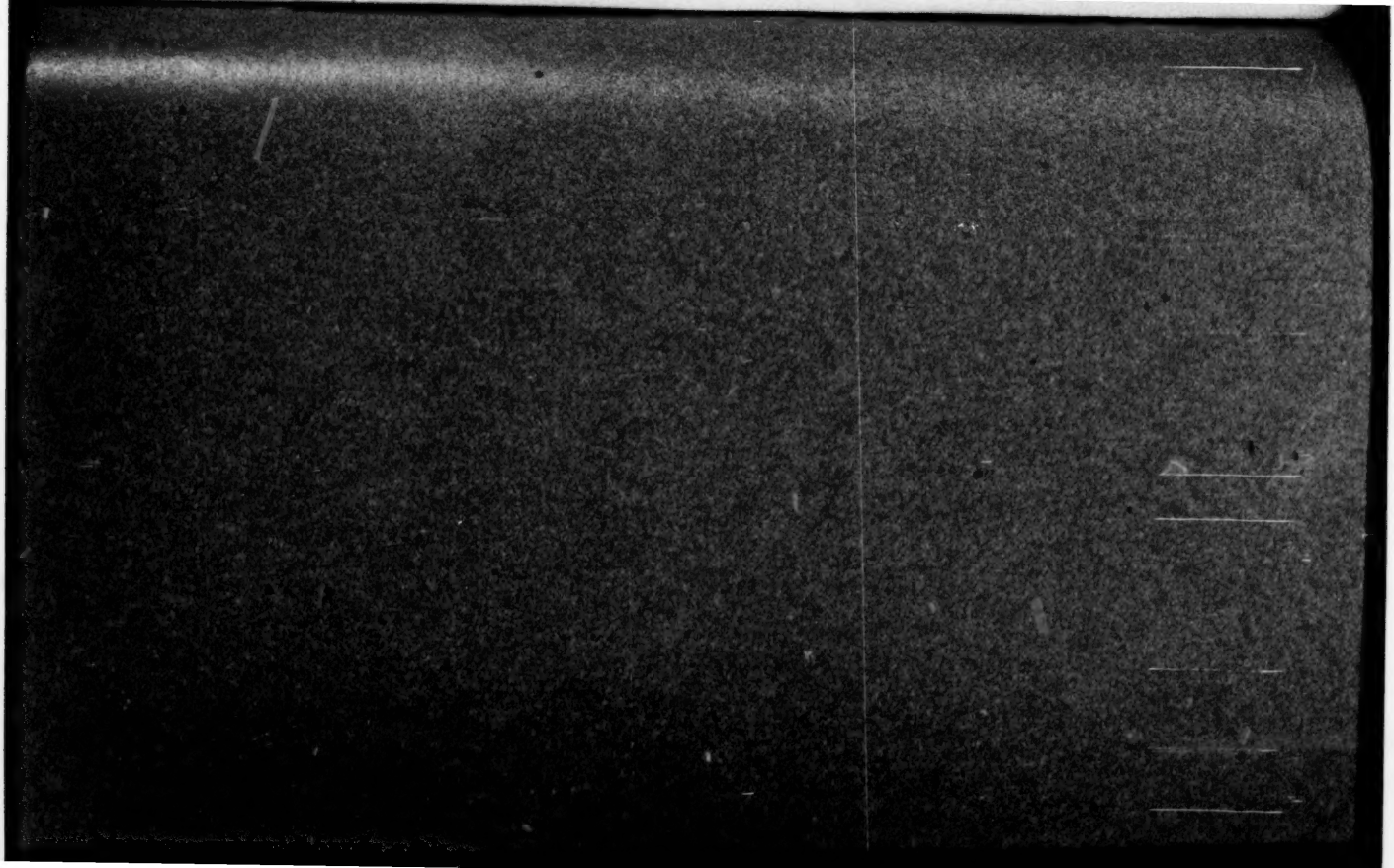
vs.

ALEXANDER ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

RECORD FILED JANUARY 3, 1899.
AGREED RECORD FILED AUGUST 30, 1899.

(16,770.)



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OCTOBER TERM, 1898.

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THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, PLAINTIFF IN ERROR,

vs.

ALEXANDER ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1898.

1 Supreme Court of the United States, October Term, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 223. Record.

Plaintiff in error respectfully submits the following statement of the errors on which it relies and the parts of the record which it deems necessary for the consideration thereof, to wit:

STATE OF NORTH DAKOTA, *County of Grand Forks,* } *ss:*

In District Court, First Judicial District.

ALEXANDER ANDERSON, Plaintiff,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant.

Amended Complaint.

The plaintiff complains and alleges:

I.

That—all times hereinafter mentioned the defendant was and still is a national banking corporation, duly organized and existing under the general act of Congress of the United States relating to
2 national banks, and doing a general banking business at the city of Grand Forks, in the State of North Dakota.

II.

That on the first day of October, A. D. 1890, the plaintiff was the owner in fee of those tracts or parcels of land lying and being in the county of Grand Forks and State of North Dakota described as follows, to wit: The northeast quarter of section five (5) and the northwest quarter of section nine (9), in township one hundred and fifty-four (154) north of range fifty-three (53) west, containing three hundred and twenty (320) acres, more or less, according to the United States Government survey thereof, and that the value of the same was then and now is the sum of seven thousand dollars ($7,000).

III.

That on the said first day of October, A. D. 1890, the plaintiff bargained, sold, and conveyed said lands by deed of warranty to one John A. Willson, and delivered the said deed thereof to said John A. Willson, and in consideration thereof the said John A. Willson executed and delivered to the plaintiff his seven promissory notes for the sum of one thousand dollars ($1,000.00) each, signed also

by Sarah J. Willson, Annie Warren, and Henry Warren, Sr., with interest thereon, at the rate of nine per cent. per annum, from that date, payable annually, each dated October 1st, 1890, and due and payable respectively December 1st, 1891; Dec. 1st, 1892; Dec. 1st, 1893; Dec. 1st, 1894; Dec. 1st, 1895; Dec. 1st, 1896, and Dec. 1st, 1897; and said John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., also executed and delivered to the plaintiff at the same time their certain mortgage upon said lands, and also certain other land therein described, in all four hundred and eighty (480) acres, securing the payment of said seven promissory notes to the plaintiff, his heirs, executors, administrators, and assigns.

IV.

That on or about the 6th day of April, A. D. 1891, the plaintiff borrowed from the defendant, at Grand Forks, North Dakota, the sum of two thousand ($2,000) dollars, and executed and delivered to the defendant his promissory note therefor, and at the same time deposited with the defendant, as collateral security for the payment of such sum, the seven promissory notes of J. A. Willson and others in favor of the plaintiff, hereinbefore mentioned, and endorsed the same to the defendant as such collateral security, and further executed and delivered to the defendant as part of such collateral security an assignment of the mortgage hereinbefore mentioned, which secured payment of said promissory notes.

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V.

That on the third day of October, A. D. 1891, the defendant telegraphed to the plaintiff, at Seattle, Washington, requesting plaintiff to telegraph the defendant his best offer for a sale of said seven promissory notes by the defendant for the plaintiff to a third person, who was not named in said telegram from defendant to plaintiff; and thereupon the plaintiff telegraphed to the defendant as follows:

"To First national bank, Grand Forks, North Dakota:
Will give discount of five hundred dollars.
ALEX. ANDERSON."

VI.

That the defendant duly received said telegram from plaintiff, and thereupon the defendant wrongfully, and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes, converted the said notes to its own use, and sold the same to itself, and on the 7th day of October, A. D. 1891, the defendant remitted to the plaintiff the sum of four thousand three hundred and ninety-seven and $\frac{48}{100}$ ($4,397.48) dollars, part of the proceeds of said sale, and mailed to the plaintiff his promissory note to the defendant for two thousand ($2,000) dollars, hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of thirty-five ($35) dollars; but the defendant has wholly failed to pay or remit or cause to be paid or

remitted to the plaintiff the balance due him on said sale or any part thereof, and the defendant is now indebted to the plaintiff and for said balance due him in the sum of twelve hundred and thirty-two and $\frac{52}{100}$ ($1,232.52) dollars, with interest thereon, at the rate of seven per cent. per annum, from and after the 7th day of October, A. D. 1891.

VII.

That at the time of the sale and conversion of said seven promissory notes, as aforesaid, the same were of the value of seven thousand six hundred and thirty ($7,630) dollars, lawful money of the United States, and that the same had not been paid to the plaintiff nor any part thereof.

VIII.

That on receiving said remittance of four thousand three hundred and ninety-seven and $\frac{48}{100}$ ($4,397.48) dollars and said note of two thousand ($2,000) dollars, the plaintiff forthwith mailed and deposited in the post-office at the city of Seattle, in the State of Washington, directed to the defendantat Grand Forks, North Dakota, a written notice that he would not accept said remittance and note as full payment of the proceeds of said sale, but that he should insist that defendant account to plaintiff for and remit to him the balance due him upon the full amount owing to plaintiff on said notes at the time of said sale, to wit, the sum of seven thousand six hundred and thirty ($7,630) dollars, less the five hundred ($500) dollars discount which had been agreed to by plaintiff, as aforesaid; but at the time of writing, mailing, and depositing said notice, as aforesaid, the plaintiff, relying on the defendant's telegram and letters aforesaid and being induced and misled thereby, believed the sale aforesaid had been made by the defendant, as plaintiff's agent, to some third person.

The plaintiff herein now elects to waive the wrongful element in the sale by defendant to itself, hereinbefore mentioned, for the purpose of maintaining this action as a suit in assumpsit to recover from the defendant the value of said promissory notes, as aforesaid, at the time of the conversion hereinbefore alleged, less the remittance already made, as aforesaid, with interest from the date of said conversion upon the balance, at the rate of seven per cent. per annum, pursuant to the opinion of the supreme court of the State of North Dakota rendered on the second appeal of this action to said court.

IX.

That prior to the commencement of this action the plaintiff demanded and caused to be demanded from the defendant payment of the balance of the proceeds of the sale of said seven promissory notes aforesaid, but that the defendant has refused and neglected and still refuses and neglects to pay the same or any part thereof to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant

for the sum of twelve hundred and thirty-two and fifty-two one-hundre-th- dollars ($1,232.52), with interest thereon, at the rate of seven per cent. per annum, from and after the seventh day of October, A. D. 1891, together with the costs and disbursements of this action, and for such other and further relief as may be just.

Dated March 25th, A. D. 1893.

PHELPS & PHELPS
Plaintiff's Attorneys, Grafton, N. D.

Not verified.

STATE OF NORTH DAKOTA, } ss:
County of Grand Forks, }

In District Court, First Judicial District.

ALEXANDER ANDERSON, Plaintiff,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant. } Answer.

Comes the defendant and for answer to plaintiff's amended complaint:

I.

Denies each and every allegation therein contained, except as hereinafter specifically admitted.

II.

Admits paragraph one (1) of said complaint, but denies that said banking business included any agency for the sale of notes, mortgages, or other securities for other persons.

III.

6 Admits that October 1st, 1890, the record title to a part of the northeast quarter (N. E. ¼) of section five (5), township one hundred and fifty-four (154), range fifty-three (53), and part only of the northwest quarter (N. W. ¼) of section nine (9), township one hundred and fifty-four (154), range fifty-three (53), was in plaintiff and was by him conveyed to said Willson, and denies that said lands were then or have since been worth to exceed forty-six hundred and ninety-five and sixty one-hundredths ($4,695.60) dollars; admits the execution of the notes and mortgage on said lands and on the northeast quarter (N. E. ¼) of section four (4), township one hundred and fifty-four (154), range fifty-three (53), and alleges that said last-named land was not then and has not since been worth to exceed thirteen hundred dollars ($1,300) over and above the encumbrances thereon, and denies each and every other allegation in paragraphs two (2) and three (3) of said amended complaint.

IV.

Admits paragraph four (4) of said amended complaint.

V.

Admits that plaintiff telegraphed defendant: "Will give discount of five hundred dollars," and denies each and every other allegation of paragraph five (5) of said amended complaint, and especially denies that defendant ever telegraphed the request referred to in said paragraph or ever made request of plaintiff.

VI.

Admits that defendant received said telegram from plaintiff and that defendant wrote plaintiff as follows:

"GRAND FORKS, N. D., *Oct.* 7, '91.

Mr. Alex. Anderson, Seattle, Washington.

DEAR SIR: Your wire October 5th to hand.

Discount	$500.00
Half per cent. commission for selling the paper	35.00
Release and record of $80 mortgage given Gates	2.00
Record of assignment	1.50
1890 taxes you stipulated to pay	47.02
Attorney for examination of abstract	5.00
7 Continuing abstract	4.50
Your note	2,000.00
Exchange on New York	7.50
Draft to balance	4,397.48
	$7,000.00

Returns for J. A. Willson seven notes. In my judgment this is a good trade for you.

Yours, S. S. TITUS, *Cr.*"

and mailed therewith to plaintiff his $2,000 note and defendant's draft for $4,397.48, and denies each and every other allegation of paragraph six (6) of said amended complaint; and defendant especially denies that it was ever the agent of plaintiff for the sale of said notes or for any other purpose whatever or ever acted or undertook to act as such agent, or ever sold said notes or any thereof to itself, or ever wrongfully converted said notes or any thereof, or ever violated any duty or obligation to plaintiff, or that it is now or ever has been indebted to plaintiff in the sum of twelve hundred thirty-two and fifty-two one-hundredths dollars ($1,232.52) or any other sum or amount whatever.

VII.

Denies each and every allegation of paragraph seven (7) of said amended complaint, and denies that there ever was a sale and conversion of said notes or any thereof, as referred to, and denies that on October 7th, 1891, or at any time prior thereto said notes were worth seven thousand six hundred and thirty-two ($7,632.00) dollars or any other sum or amount in excess of six thousand dollars ($6,000).

VIII.

Admits that about October 13, 1891, plaintiff wrote defendant as follows:

"SEATTLE, WASHINGTON, *Oct.* 13, 1891.

First national bank, Grand Forks, N. Dak.

GENTLEMEN: Your letter, with enclosed draft for $4,397.48 and note of $2,000, is at hand, which I cannot accept. I wired
8 you that I would give a discount of five hundred dollars, and you make a discount of about $1,175. I did not agree to pay any other expenses. These notes call for $7,000.00 and $630 interest. I shall expect balance of money by return mail.

Yours respectfully, ALEX. ANDERSON."

and denies each and every other allegation of paragraphs eight (8) and nine (9) of said amended complaint, and especially denies that plaintiff was ever misled in any manner by defendant's telegrams and letters or any thereof or ever believed or acted or any belief that any sale had been made by defendant as plaintiff's agent to a third person, or ever recognized defendant as his agent for the sale of said notes or for any other purpose, or ever recognized any such sale, or ever considered or supposed that he was dealing with any person but defendant, or ever claimed, demanded, or in any way referred to or considered the proceeds of any sale or supposed sale by defendant as a basis for his claim against defendant; and alleges that plaintiff claimed the balance above referred to upon the basis and claim of a sale of said notes by plaintiff to defendant as principals.

IX.

Defendant alleges the truth and facts in relation to said transaction to be as follows and not otherwise:

From April 6th, 1891, to October 5th, 1891, defendant held said seven notes as collateral security to plaintiff's note of two thousand dollars ($2,000). During and prior to said period, by and in certain conversations, letters, and telegrams, plaintiff offered to sell said notes to defendant at certain discounts from face, and defendant offered to purchase them from plaintiff at other and greater discounts.

X.

That defendant expected to rediscount said notes in case it purchased them from plaintiff, and did not desire to purchase unless it had reasonable assurance of being able to rediscount them in terms profitable to itself. Its offer to purchase from plaintiff was made only when it had such assurance, and defendant in its letters and telegrams referred to third parties to whom it expected to sell or rediscount said notes in case it purchased them from plain-
9 tiff as a reason why a prompt answer was desired; that plaintiff was interested in such prospective rediscount or sale by defendant to a third party for the reason that the prospect or assurance of such sale constituted an inducement to defendant to pur-

chase from plaintiff, but for no other reason. Such rediscount or sale by defendant, in case any should be made, would in itself be a transaction wholly between defendant and a third person and to which plaintiff would be in no sense a party and in which plaintiff would have no claim, right, or interest whatever, and from said conversations, letters, and telegrams the foregoing facts became and were fully known by and between the parties to this action.

XI.

That throughout said transaction defendant, by its officers, understood all negotiations to be for an absolute sale of said notes by plaintiff to defendant, and understood and believed and still believed, and was and is justified in believing, that plaintiff so understood said negotiations; that all communications from defendant to plaintiff in relation thereto were with that intent and purpose, and defendant intended they should be, and believed and still believes that they were so understood by plaintiff, and that all said communications considered together disclose said intent; that all communications from plaintiff to defendant were understood and believed by defendant to be so intended by plaintiff, and defendant was and is justified in so believing, and said communications, considered together, show such intent.

XII.

That upon receipt of plaintiff's telegram and from the terms thereof, together with the proceedings, negotiations, and communications in relation thereto, and the conditions of the title to said lands and certain agreements made by plaintiff in regard to taxes, and the reasonable commission and expenses of clearing the title, defendant believed, and was justified in believing, that plaintiff intended said telegram as an offer to sell said notes to defendant for sixty-five hundred dollars (6,500), less plaintiff's note for two thousand dollars (2,000) and less the aforesaid taxes and expense of clearing the title to said lands, amounting to about one hundred two and fifty-two one-hundredths dollars ($102.52).

10 XIII.

Acting upon said belief, defendant accepted said offer or supposed offer and wrote the aforesaid letter of October 7th, 1891, with the enclosure of note and draft aforesaid, and defendant alleges that thereby was completed a contract by and between the parties hereto, whereby plaintiff sold to defendant all of said notes, and that plaintiff received payment in full therefor.

XIV.

That if there was any mistake of fact in regard to the terms of said offer, it was only as to the amount for which plaintiff intended to offer the notes for sale and the payment of said one hundred and two and $\frac{52}{100}$ ($102.52) dollars, and was not as to any question of agency. Neither plaintiff or defendant had then thought of or

referred to any agency, and if there was any mistake of fact, the same was made through the fault of plaintiff, and plaintiff did not seek to avoid said contract or rescind same on account of any such mistake.

Wherefore defendant demands judgment against plaintiff for its costs and disbursements in this action.

Dated Grand Forks, North Dakota, October 23, 1895.

BURKE CORBET,
Attorney for Defendant.

October 28th, 1895, defendant served upon plaintiff its notice of motion for leave to amend its original answer to plaintiff's original complaint, together with copy of the proposed amendment and copy of affidavit of Burke Corbet in support thereof; which proposed amendment, omitting the formal parts, was as follows:

Amendment to Answer.

Comes defendant and, with leave of court first granted, amends its answer to plaintiff's original complaint by:

I.

Striking therefrom paragraph five (5) thereof and substituting in lieu of said paragraph the following:

Defendant denies that it owes or is indebted to the plain-
11 tiff in any sum or amount whatever, and alleges that the aforesaid notes mentioned in said complaint were sold by plaintiff to defendant, and that defendant has fully complied with the terms of said sale and paid plaintiff the entire agreed price therefor by paying, applying, and appropriating the proceeds thereof strictly in accordance with plaintiff's offer, agreement, and direction.

II.

That by the allegations so stricken out defendant intended to allege the facts as above amended, and believed and still believes that, properly construed together with defendant's general denial, including a denial of all acts or offers of agency and of any sale by defendant to a third person, said original paragraph reasonably imports the same facts alleged in the substituted paragraph.

III.

That at the time of answering plaintiff's original complaint defendant understood the real controversy between the parties to be, and in fact it then was, solely as to the price for which plaintiff offered to sell said notes, whether at a discount from the principal sum or face of the notes or from said face and interest added, and as to the right of defendant to apply and appropriate one hundred and two and $\frac{5}{100}$ ($102.52) dollars to the payment of certain taxes and expenses, and not at all as to the question of plaintiff's sale to

defendant, for and on account of which reason defendant failed to make the allegations as to the sale by plaintiff to defendant as specified as they should properly have been made, and drew said answer with a view to the controversy as to the amount and disposition of the agreed purchase price.

Dated at Grand Forks, North Dakota, October 26, 1895.

November 8, 1895, the court, upon a hearing thereon, made the following order, which, omitting the formal parts, is as follows:

Order Granting Leave to Amend Answer.

On this 8th day of November, at two (2) o'clock p. m., at chambers, in the court-house, in the city of Grand Forks, county of Grand Forks, State of North Dakota, this action coming on for hearing on motion of defendant for an order granting the defendant leave to amend its original answer, and it appearing to the court that due and legal notice had been given the plaintiff of such action and the time and place thereof, and Burke Corbet appearing as attorney for the defendant in support of said motion, and Phelps & Phelps, as attorneys of record for the plaintiff, appearing on behalf of plaintiff and resisting said motion, and after reading and filing the notice of motion, the proposed amendment, and the affidavit of Burke Corbet, and an inspection of the records in this case, and the affidavit of H. W. Phelps in behalf of plaintiff, and it appearing that such prior order would be in furtherance of justice:

Now, therefore, it is hereby ordered and adjudged that defendant have leave to amend his answer as appears in its proposed amendment, and said answer is hereby so amended; to all of which plaintiff objects, and to which order and ruling the plaintiff excepts, and the exception is allowed.

Dated this 8th day of November, A. D. 1895.

By the court:

CHARLES F. TEMPLETON, *Judge.*

O. and M. Book 2, page 439.

January 30, 1897, defendant filed with the clerk its additional exceptions to depositions, which, omitting the formal parts, were as follows:

Additional Exceptions to Depositions.

Comes the defendant before this case is called for trial and objects and excepts to the several questions, answers, and exhibits of the deposition of Alexander Anderson, which purports to have been taken May 29th, 1893, as follows:

VII.

Defendant objects to the introduction of Exhibit "A," the telegram of October 3, 1891, as irrelevant, immaterial, and incompetent, as variance from the telegram alleged, and no foundation

laid by accounting for the absence of the original, if any, de-
13 posited with the telegraph company at Grand Forks, or showing that the same was written or sent by defendant or by its authority or in any manner connected with defendant, and because plaintiff has pleaded no contract of agency as a fact to be proved by evidence, but has pleaded two specific telegrams constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3, 1891, by the defendant, and Exhibit "A" is not relevant, material, or competent to prove that fact.

VIII.

Defendant objects and excepts to the interrogatories 11, 12, 13, 14, 15, 16, 17, and 18, and each thereof, for the same reasons and on the same grounds as the objections to the introduction of Exhibit "A," and as insufficient to identify Exhibit "A" as the telegram of defendant or to connect defendant therewith.

IX.

Defendant objects and excepts to the introduction of Exhibit "E," the letter of September 14th, 1891, as irrelevant, immaterial, and incompetent, no foundation laid by proving the authority of the writer to bind defendant bank thereby, and especially the authority of the writer to make a contract on behalf of the defendant bank that it would assume the duties and responsibilities of plaintiff's agent for the sale of notes and mortgage to a third person, such authority not being included in the implied or customary powers of the cashier of a national bank, nor one which can be assumed from such official position only; also because plaintiff has pleaded no contract of agency to be proved by evidence, but has pleaded two specific telegrams, constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3rd, 1891, by defendant, and Exhibit "E" is not relevant or competent to prove that fact.

X.

Defendant objects and excepts to interrogatories 44, 45, 46, 47, 48, 49, and 50 and the answers thereto, and each of said interrogatories and answers, for the reasons and causes set out in the above objection to Exhibit "E."

And defendant objects to each of said interrogatories and
14 answers separately for the reasons set out, and moves the court to strike out separately each and every answer therein contained and each and every exhibit thereto attached or therein referred to.

Dated Grand Forks, North Dakota, January 30th, 1897.

BURKE CORBET,
Attorney for Defendant.

To the above objections and exceptions to depositions — argued and submitted, and on each and every ground and for each and every

reason overruled and denied; to each ruling of which defendant duly excepts, and exceptions are allowed, and the same and all thereof are hereby ordered brought upon and made a part of the record in this case.

Done in open court, before calling a jury, February 2nd, 1897.

C. J. FISK, *Judge.*

O. & M. Book 3, 212.

A jury being empannelled, the case was tried, and the proceedings had therein are set out in the settled statement of the case, which is as follows:

Statement of the Case.

This cause coming on regularly for trial at the adjourned December, 1896, term, holden on February 2nd and 3rd, 1897, before the Honorable Charles J. Fisk, judge, and a jury, Henry W. Phelps, of the firm of Phelps & Phelps, as counsel for plaintiff, and Burke Corbet for defendant, the following proceedings were had:

Plaintiff offered in evidence depositions of Anderson of May 29th, 1893. Defendant objected to the introduction of any evidence on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action. Overruled. Exception.

Plaintiff read in evidence the deposition of Alexander Anderson, taken May 29, 1893, being the only deposition produced on the trial.

Defendant interposed oral objections to *such* interrogatory, except the first and second, when read, and to each exhibit when offered, separately and before reading such exhibit or answer to such interrogatory, as upon oral examination of the witness in open court, upon the ground that the same was irrelevant, incompetent, and immaterial; also specifying additional grounds of irrelevancy and incompetency as shown below, and each of such objections was at the time overruled for the reason, among others, that no objections nor exceptions to said deposition or any part thereof were made or filed at or previous to the first trial of this action, and no objections nor exceptions to the deposition were made or filed at or previous to the second trial of this action, except objections made to Exhibits A, B, and C thereof, and defendant then duly excepted to such rulings; which exceptions were allowed, and the following are specific instances of such interrogatories, objections, rulings, and exceptions relied upon by defendant:

IX.

The testimony of witness to the effect that he was the plaintiff, resided at Seattle, and on October 1, 1890, had been the owner of the 350 acres of land described in complaint. Interrogatory ten was then read.

Int. 10. State whether or not you were, on the 3rd day of October, 1891, the owner of said seven promissory notes described in the complaint in this action.

Ans. I was.

Int. 11. State whether or not on said date (Oct. 3, 1891) you received a message, purporting to have been sent to you by defendant, relating to said notes.

A. I did.

Int. 12. Who delivered it to you?

A. The telegraph messenger employed in the office of the Western Union Telegraph Company, at Seattle, Washington.

Int. 13. State whether or not you know the handwriting of the telegraph operator then in charge of that office.

A. I do.

Int. 14. State whether or not you now have the message that was then delivered to you.

A. I have.

Int. 15. If so, produce it and have it annexed to this deposition, marked Exhibit "A."

Plaintiff offered in evidence Exhibit "A," attached to said
16 deposition, which was as follows:

"Received at SEATTLE, WASH., *Oct.* 3, 1891.

Alex. Anderson, Seattle:

Did you receive our letter September 14th? Wire us your best offer so we can advise a party who said he would hold his money until we heard from you.

FIRST NATIONAL BANK."

Defendant objected to the introduction of Exhibit "A," the telegram of October 3, 1891, as irrelevant and incompetent, a variance from the telegram alleged, and no foundation laid by accounting for the absence of the original, if any, deposited with the telegraph company at Grand Forks, or showing that the same was written or sent by defendant or by its authority or in any manner connected with defendant, and because plaintiff has pleaded no contract of agency as a fact to be proved by evidence, but has pleaded two specific telegrams, constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3, 1891, by the defendant, and Exhibit "A" is not relevant, material, or competent to prove that fact; which objection was overruled by the court; to which ruling defendant duly excepted.

Int. 17. State, if you know, in whose handwriting this message was written.

A. It is written in the handwriting of a telegraph operator employed in the office of the W. U. Telegraph Co. at Seattle, Washington, at that time.

Int. 18. State whether or not you replied to this message; and, if so, when.

A. I did, on October 5th, 1891.

Int. 19. If so, in what manner did you reply to it?

A. I replied by telegra*ph* addressed to the defendant at Grand

Forks, North Dakota; delivered it to a telegraph operator in the office of the Western Union Telegraph Company at Seattle, Washington, to be sent to the defendant, charges prepaid.

Int. 20. State whether or not you have the original telegram which you have mentioned.

A. I have not.

17 Int. 21. State whether or not you made a copy of the same.

A. I did.

Int. 22. If so, state whether or not you have that copy.

A. I have.

Int. 23. If so, you may refresh your memory by referring to the same and give the contents thereof in this deposition.

A. The contents were as follows:

"SEATTLE, WASHINGTON, *Oct.* 5, 1891.

First national bank, Grand Forks, N. Dak.:

Will give discount of five hundred dollars.

ALEX. ANDERSON."

Int. 24. Have this copy annexed to this deposition, marked Exhibit "B."

Copy offered and read in evidence; to which defendant objected on the grounds that it is irrelevant, incompetent, no foundation laid. Overruled. Exception.

Int. 25. State whether or not this is the copy which you have mentioned, marked Exhibit "B" and attached to this deposition.

A. It is.

Int. 26. State whether or not you received a reply from the defendant to this telegram; and, if so, what it was—by letter or by telegram.

A. I did, by letter.

Int. 27. Where and how did you receive this letter?

A. At Seattle, Washington, in the usual course of the mail.

Int. 28. State whether or not you now have that letter.

A. I have.

Int. 29. If so, produce it and have it annexed to this deposition, marked Exhibit "C."

A. Witness produced letter, which was offered in evidence. This is the letter, dated October 7th, 1891, from defendant to plaintiff, set out in defendant's answer, and was read in evidence.

Int. 31. What, if anything, was enclosed in this letter when you received it?

18 A. A New York draft for $4,397.48, payable to myself; also my note to the defendant for $2,000, due December 14, 1891, with interest paid to its maturity, duly cancelled. This is the same note mentioned in paragraph four in the complaint in this action.

Int. 32. State whether or not you replied to this letter, and, if so, when.

A. I did, on October 13th, 1891.

Int. 33. If so, in what manner did you reply to it?

A. I replied by letter addressed to the defendant, Grand Forks, North Dakota; deposited it in the post-office at Seattle, Washington, in the usual course of mail, with postage prepaid.

Int. 34. State whether or not you now have that letter.

A. I have not.

Int. 35. State whether you made a copy of the same.

A. I did.

Int. 36. If so, state whether or not you now have that copy.

A. I have.

Int. 37. If so, you may refresh your memory by referring to the same and give its contents in this deposition.

A. Its contents were as follows:

"SEATTLE, WASHINGTON, *October 13th*, 1891.

First national bank, Grand Forks, North Dakota.

GENTLEMEN: Your letter with enclosed draft for $4,397 is to hand, which amount I cannot accept. I wired you I would give discount of $500, five hundred dollars, and you have made a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000.00 and $630 interest. I shall expect balance of money by return mail.

Yours respectfully, ALEX. ANDERSON."

Int. 38. Have this copy annexed to this deposition, marked Exhibit "D."

A. In answer, Exhibit "D" attached to deposition and identified.

Int. 39. State whether or not this is the copy which you have mentioned, marked Exhibit "D" and attached to this deposition.

A. It is.

Int. 40. State whether or not you have received any further
19 payment or remittance of any nature from the defendant for the proceeds of the sale of those seven Wilson notes mentioned in the complaint.

A. I have not.

Int. 43. State whether or not any portion of the notes in question has ever been paid to you by the signers of the same or in any other manner than by the remittance of the defendant which you have mentioned.

A. It has not.

Int. 44. State whether or not you have the letter of September 14th mentioned in Exhibit "A."

A. I have.

Int. 45. If so, where and how did you receive this letter?

A. At Seattle, Washington, in the usual course of the mail.

Int. 46. If so, produce it and have it annexed to this deposition, marked Exhibit "E."

This was afterwards marked Exhibit "11."

A. The letter produced.

Int. 47. State whether or not this is the letter you have just mentioned, marked Exhibit "E" and attached to this deposition.

A. It is.

Plaintiff here offers Exhibit "E," referred to, and which was as follows (this letter written on defendant's letter-head):

"GRAND FORKS, *September 14th*, 1891.

Mr. Alex. Anderson, Seattle, Wash.

DEAR SIR: We never make a trade in the way you mention—that is, pay a part and later on send or pay more. We, if we make a trade with any one, always close it up at once. Then it is complete and out of the way. If I had a basis to work on, I might find some one who would take the paper. You offered it at $350 ($370.00) discount. We offered you a trade at $1,000 discount. Now, if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you, you, as I wrote you, to make the title clear and straight if anything should come up in the deal. The paper could be sold easier if it all run not to exceed five years. Capitalists kick on anything over five years. Money is close and is going to continue. Wheat is going down every day; looks as though 65 or 70 cents will be the average price farmers will receive for this crop. If you care to have us go to work on these terms, you write or wire me.

Yours, S. S. TITUS, *Cr.*"

To which defendant objected on the ground that it was irrelevant, immaterial, and incompetent; no foundation laid by proving the authority of the writer to make a contract on behalf of the defendant bank that it would assume the duties and responsibilities of plaintiff's agent for the sale of notes and mortgage to a third person, such authority not being included in the implied or customary powers of the cashier of a national bank, nor one which can be assumed from such official position only; also for the reason that the plaintiff has pleaded no contract of agency to be proved by evidence, but has elected to plead two specific telegrams constituting in law such contract, and that the fact in issue is the sending of the alleged telegram of October 3rd, 1891, by defendant, and Exhibit "E" is not material, relevant, or competent to prove that fact; which objection was overruled by the court; to which ruling defendant duly excepted.

Int. 48. State, if you know, what paper is referred to in Exhibit "E."

A. The same seven promissory notes mentioned in the complaint in this action.

Int. 49. State whether or not at any time during this correspondence you had any paper payable to you or owned by you in the defendant's possession other than the seven promissory notes mentioned in the complaint in this action.

A. I did not.

Int. 50. State whether or not you replied to this last-mentioned letter.

A. I did not.

Int. 51. State, if you know, what notes are referred to in Exhibit "C" where the J. A. Willson seven notes are mentioned.

A. The same seven promissory notes mentioned in the complaint in this action.

Int. 52. State whether or not you know Mr. S. S. Titus, of Grand Forks, North Dakota?

A. I do.

21 Int. 53. If so, how long have you known him?

A. Ever since about 1883.

Int. 54. State, if you know, in what position he was acting during April, 1891, and from that time up to and including the month of October, 1891.

A. He was then acting as cashier in The First National Bank of Grand Forks, North Dakota, the defendant in this action.

Int. 55. State whether or not you know his handwriting?

A. I do.

Int. 56. If so, state whether or not the letters marked Exhibit "C" and Exhibit "E," which are here annexed to your deposition, are in his handwriting.

A. They are.

(It was stipulated by the parties that Roy L. Boulter, if sworn, would testify that he is and since June 18th, 1893, has been manager of the Western Union Telegraph Company at Grand Forks, North Dakota, and been in the telegraph business twelve years; that it has been since prior to 1891 and still is a rule of the company to burn all telegrams six months from sending or receipt; that witness has made diligent search at his office for a telegram dated October 3rd, 1891, purporting to be sent by First national bank to Alexander Anderson, at Seattle, and cannot find any such telegram, and that witness has no knowledge whether any such telegram was ever sent. Witness will also swear that October 3rd, 1891, there was no other telegraph company doing business in Grand Forks, North Dakota. It is further stipulated that such testimony is regarded as being given subject to the objections incompetent, irrelevant, and immaterial.)

S. S. TITUS, sworn and examined as a witness for plaintiff, this defendant in error, testified:

I reside in Grand Forks; was cashier of the defendant bank during and since October 7th, 1891; had some correspondence with plaintiff; think I had some about October 7th, 1891.

Q. Mr. Titus, you may state whether or not, as cashier of the First National Bank of Grand Forks, North Dakota, you had

22 any correspondence with Alexander Anderson, the plaintiff in this action, on or about the 7th of October, 1891, and prior thereto, leading up to the transaction with the plaintiff of the following-described notes: Seven promissory notes of the sum of one

thousand dollars each, signed by John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., with annual interest, nine per cent., payable annually, up to December first, 1897.

A. I had some correspondence with Mr. Anderson; sent him some money in payment of his notes—those same notes. The bank became the owner of the notes prior to that time, at the time the loan was made, in the spring. (Witness produced a book and testified:) I have what is called the bills-receivable register. It is used by the defendant bank to keep a record of its notes, some of its property. There is where we enter up our bills receivable. There is a record there of seven notes for $1,000 each, signed by John A. Willson, Sarah J. Willson, Annie Warren, and Henry Warren, Sr., entered up in that book as of the date of October 7th, 1891; had possession of the notes prior to that date and before the loan.

Q. Please state how that paper came to be left with you in the first place.

A. It was first left with the bank as collateral security for a debt.

Q. How much was the debt?

A. Two thousand dollars.

Q. Whose debt was it?

A. Alexander Anderson's.

Witness continued: I did not see plaintiff personally in regard to the sale of the notes prior to October 7th, 1891. I had some correspondence with him. I think it commenced in August, 1891.

Witness was handed some letters and asked:

Q. Upon what date was the first item of correspondence?

A. August 11, 1891, appears to be the date of the first letter. Letter is marked Exhibit "3." I have seen this letter before; I presume four or five days after the date.

Q. Where did you receive that letter?

A. I received it at Grand Forks.

Q. You have already stated in the due course of the mails?

23 A. Yes.

Plaintiff offers in evidence Exhibit "3," being letter from Alexander Anderson, dated August 11, 1891, and over defendant's objection the letter was received and read in evidence to the jury and was as follows:

"SEATTLE, WASH., *Aug.* 11, 1891.

Mr. S. S. Titue, Grand Forks, N. D.

DEAR SIR: Any time you feel like buying those notes of mine, let me hear from you.

ALEX. ANDERSON."

Q. State whether or not you replied to that letter; and, if so, when?

A. I replied to the letter on the 17th of August, 1891.

Witness continued: I have not the original letter; I have letter-press copy.

S. S. TITUS being recalled, plaintiff offered in evidence Exhibit "4," which purported to be a letter-press copy of a letter dated August 17th, 1891.

Exhibit "4" is received in evidence and read to the jury.

"Alexander Anderson, Seattle, Washington:

Your favor of the 11th received. The offer to sell coming from you, you have neglected to say what you will take for the paper. I notice that it has a long time to run, the last note coming due in 1897. I presume the title is O K, but have not had it examined by our attorney. Money is very close here, and is liable to remain so all over the country for some time to come, certainly till after the next Presidential election, and even then, if the silver question is not settled, financial disturbances will continue. We may take the paper from you if it can be had at a discount that will warrant us in accepting it, but until we hear from you again we can give no definite answer. You will have to make a very liberal offer before we will take even time to go to the expense of looking it up.

S. S. TITUS, *Cashier.*"

Witness continued: I received a reply by letter dated August 27th, 1891.

Letter identified and marked Exhibit "7," which plaintiff offered in evidence.

24 Exhibit "7" was read in evidence and was as follows:

"SEATTLE, WASH., *August 27th*, 1891.

S. S. Titus, Grand Forks, N. D.

DEAR SIR: Your letter of the 17th is to hand regarding notes. I consider those notes worth face value, being well secured on as good land and as well located as anything you have in N. D., bearing good rate of interest, but think I can use the money to good advantage, and therefore would be satisfied to give a discount of five per cent. on face.

Very respectfully, ALEXANDER ANDERSON."

Witness continued: I replied by letter of September 3rd, and have not the original letter. I have a copy of it. The writing on the back of the letter, Exhibit "7," is a memorandum. It appears to be of date August 31st, 1891. It is neither a telegram or letter. It is in my handwriting. I don't know why I placed it there; I presume it is a copy of come of this correspondence—letters. I have not the original; I can't say whether I had the original when I made this memorandum; I don't remember; defendant's signature is not appended to it. It is my handwriting where it says "1st nat. bank," but it is not the signature. The words wired him, in pencil, above the memorandum in ink, is in my handwriting.

Memorandum marked Exhibit "8" is offered in evidence by plaintiff.

Exhibit "8" is received in evidence and read to the jury:

"Wired him." If accepted now, a party is here, so we can send you $4,000.00, together with your note, you to make the title good if anything comes up. Answer by wire at once.
Aug. 31, '91.

1ST NAT. BK.

Witness continued: I have before me a letter book, open at date September 3rd, 1891. I have not the original letter.

S. S. TITUS, recalled on behalf of plaintiff:

Plaintiff offers in evidence letter-press copy, Exhibit "9," of letter dated September third, 1891. Letter received and read in evidence, and was as follows:

GRAND FORKS, N. D., *Sept.* 3, 1891.

Alexander Anderson, Seattle, Wash.:

August 31 we wired you. If accepted now, a party is here, so we can send you $4,000, together with your note, you to make title good if anything comes up. Answer by wire at once. We overlooked confirming the same the same day. As yet we have received no reply, and come to the conclusion that you do not wish to sell the paper.

Money is very close here now and is going to be all over the Northwest, no matter how large the crop is.

S. S. TITUS, *Cashier.*

Witness continues: I received a letter in reply, dated September 8, 1891.

Produced and marked Exhibit "10."

Plaintiff offers letter marked Exhibit "10" in evidence, being letter from plaintiff to defendant's cashier, dated September 8th, 1891.

Exhibit "10" is received and read to the jury:

SEATTLE, WASH., *Sept. 8th*, 1891.

S. S. Titus.

DEAR SIR: Yours of the 3rd inst. is at hand. I do not wish to sell notes for the figures you offer. If you send $4,000 and note, balance some other time, it is all O K. I wrote you saying I would give a discount of five per cent. on face of notes.

Very respectfully, ALEXANDER ANDERSON.

Witness continues: This letter was answered by letter September 14th, 1891.

Exhibit "E" of Anderson's deposition produced, identified, and marked Exhibit "11," and witness stated: That signature is mine.

Plaintiff offers Exhibit "11" in evidence.

Defendant renews its objections to the introduction of Exhibit "11," being the letter of September 14th, 1891, as incompetent, irrelevant, and immaterial; no foundation laid by proving the authority of the writer to bind the bank thereby, and especially the authority

of the writer to make a contract on behalf of the bank to assume the duties and responsibilities of plaintiff's agent for the sale of the mortgage and notes to a third person, such authority not being the customary powers of a national bank or one that can be assumed by one of its officers, and also that the plaintiff has plead no contract of agency, and the fact in issue is the sending of the
26 telegram of October third, 1891, by the defendant; and Exhibit "11" is not material, relevant or competent to prove that fact; which objection is overruled by the court; to which ruling the defendant, by its counsel, duly excepts.

Exhibit "11" read in evidence and was as follows:

This is the same set out as Exhibit "E" to the deposition.

(A paper purporting to be a telegram received at Grand Forks, North Dakota, dated Seattle, Washington, October 5th, 1891, directed to First national bank, Grand Forks, N. D., saying, "Will give discount of five hundred dollars," signed Alexander Anderson, having certain pencil memoranda on back as follows: "Copy. Oct. 3, '91. Did you receive our letter Sept. 14? Wire us your best offer, so we can advise a party who said he would hold his money till we hear from you. 1st Nat. Bank;" and the back of the telegram was marked "Ex. 12," the face of the telegram being subsequently marked "Ex. 13.")

The witness' attention was called to the pencil memoranda by counsel for plaintiff, who asked: "What was the next item of your correspondence with the plaintiff?" and witness continued: October 7th, 1891, is the only record I have.

Q. You may state whether or not, Mr. Titus, on the first trial of this action, in the month of June, 1893,—state whether or not you did not make a different answer than the one you have just given to my question as follows: "What was the next correspondence that passed between yourself and the plaintiff in this case?"

A. I would have to refer to the record to see.

Q. Now that you have looked at the transcript, state whether or not you did make a different answer on the first trial of this case to that question.

A. I don't know that I did.

Q. You may state whether or not you telegraphed to the plaintiff in regard to the same notes on or about the third of October, 1891.

A. I have no recollection of telegraphing him.

Q. State whether or not you did have a recollection of telegraphing him on or about the third of October; 1891, when you first testified as a witness in this case on the first trial in June,
27 1893.

And the witness continued: I have no recollection of sending him a telegram on the third of October, 1891.

Q. Did you not testify on the first trial of this action as follows, "I wired him, asking if he had received our letter of September 14th, the last letter we wrote," in answer to the following question:

"What was the next correspondence that passed between yourself and the plaintiff in this case?"

(Counsel for plaintiff: The question is not for the purpose of impeaching or laying any foundation for impeachment, but for the purpose of refreshing the recollection of the witness.)

A. My recollection is that my testimony at the former trial was——

Defendant objects to the answer, as the question can be answered by yes or no.

By the COURT: The witness may answer yes or no.

Q. Do you remember, Mr. Titus?

A. There is a little more testimony there, and I cannot answer it without reading it all over. My answer will be—I referred to that telegram as a memorandum, I think, at the former trial, simply going by the record I had of having wired him—this memorandum slip here, "Ex. 12," of date October 3rd, 1891—and in giving my testimony, as I remember it, at the former trials, to keep this correspondence up I had copied this from something—I don't know where now. I had made a copy of that from some place to keep the chain of correspondence up.

Q. When you had that exhibit before you at the former trial, which was at one time marked "Ex. G," with the initial letter "F" signed, state whether or not the telegram was read in evidence.

A. Possibly a copy of the alleged telegram was read; I don't remember.

Q. Did you not on the first trial of this case, in response to the following question, "To that letter of September 14th, did you receive a reply, Mr. Titus?" did you not answer as follows: "I don't think we received any reply by mail."

A. Possibly I did.

28 A. Possibly I testified on former trials.

Q. To the effect the same as the answer is there?

A. Whatever that is.

Q. Mr. Titus, after this "Ex. 12," just referred to and which was then "Ex. G," was offered in evidence, did you not testify in response to the following question, "To that telegram did you receive a reply?"—did you not answer as follows: "I did"? Q. On the first trial of this case?

A. Possibly I did.

Q. You may state whether or not, on or about the 3rd of October, 1891, to the best of your recollection and belief, you sent the telegram to the plaintiff, of which Exhibit "12" appears to be a copy, which you have mentioned.

A. I have no recollection of sending such a telegram.

Q. State whether or not you sent the plaintiff, Mr. Alexander Anderson, any telegram on or about the third of October, 1891, to the best of your knowledge and belief.

A. I have no recollection of having sent Mr. Anderson any telegram on or about the third of October, 1891.

Q. State whether or not, on or about the fifth of October, 1891, you received any telegram from the plaintiff, Alexander Anderson.

A. All I have got to go by is this. I presume this came to Grand Forks about that time.

(Telegram is marked Ex. 13.)

29 Q. When you have just testified in regard to this telegram of the fifth of October, 1891, do you mean "Ex. 13"?

A. Yes; I presume so. That does not refer to any memorandum on the back of it.

Q. State whether or not, Mr. Titus, that is a memorandum in your handwriting on this "Ex. 13."

A. There is.

Q. Made by yourself?

A. It was.

Q. And this "Ex. 13" has been in your possession at some previous time to the time you made that memorandum?

A. Yes, sir; I have seen this before.

Q. Is it part of the same correspondence you had with the plaintiff in regard to these notes?

A. It has been in court here three or four years. I have seen it two or three times, I presume. I don't know whether that is the original one that I received or not.

Plaintiff offers in evidence "Ex. 12," being the memorandum of copy which the witness says, in substance, has been referred to on this trial before, and also offers "Ex. 13."

"Ex. 12 and 13" received in evidence.

Q. Mr. Titus, after this telegram of October 5th, 1891, just introduced in evidence, what was the next item in general of the correspondence referred to?

A. Well, as I said, my records show that after the letter of September 14th——

Q. I ask of October 5th.

A. The next after September 14th, the next letter, the next record I have is October 7th, 1891.

Q. Will you examine this original letter; is this your signature?

A. Yes; it is.

Letter is marked "Ex. 14" for identification, attached to deposition.

Q. The letter you have referred to is the one dated October 7th, 1891, marked Ex. "14"?

A. Yes, sir.

30 Q. You have already stated that that is your signature to that letter?

A. I did.

Q. That is "Ex. C" in the deposition of Alexander Anderson?

A. I don't know what number it is.

Q. Will you examine it?

A. I presume it is.

Q. At any rate, it is the letter in the deposition of Alexander Anderson dated October 7th, 1891?

A. I presume so.

Plaintiff offers in evidence "Ex. 14." "Ex. 14" is received as part of Mr. Titus' examination.

Q. Mr. Titus, when that letter was—you have testified to your signature; did you send that letter to Mr. Anderson, the plaintiff?

A. I presume so.

Q. What, if anything, did you send with it?

A. I sent a draft.

Q. For how much?

A. Just what the letter calls for.

Q. What else, if anything, besides the draft was sent with that letter of October 7th?

A. Whatever the letter says.

Q. You can refresh your memory from it.

A. It don't say. It says your note for two thousand dollars——

Q. That is, Mr. Anderson's note?

A. I guess so.

Q. This two thousand dollars referred to is the note — referred to when first called as a witness on this trial?

A. Yes, sir.

Q. The two thousand dollars that Mr. Anderson borrowed from you?

A. Yes.

Q. What is it you say in this letter returns for J. A. Willson seven notes—are those the same notes mentioned in the complaint?

A. I presume so.

Q. You have said that the defendant is the owner of those notes?

Defendant objects, and the question is withdrawn.

Q. Mr. Titus, from whom did you purchase those notes?

Defendant objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, calling for the con-
31 clusion of the witness; which objection is overruled by the court.

Question by Mr. PHELPS: "From whom did you purchase these notes, Mr. Titus—the person?"

A. Alexander Anderson.

Witness shown assignment of notes and mortgage, which was identified by the witness, who stated he received it in April, 1891, about the time of the loan of $2,000. Assignment marked "Ex. 16" and received and read in evidence. (This assignment is dated the 6th day of Ap'l, A. D. 1891, signed by Alexander Anderson, running to the First National Bank of Grand Forks, N. Dak., and described the mortgage mentioned in the complaint, "together with the notes which said mortgage secures.")

Q. You have seen this mortgage before?
A. I have.
Q. Is the defendant the owner of this mortgage?
A. It is the present owner of it; yes.

Mortgage is marked "Ex. 17" for identification and is offered in evidence. "Ex. 17" is received in evidence and is the same mortgage mentioned in paragraph "III" of the complaint.

Q. When you stated yesterday forenoon that the defendant had owned the notes in suit some time prior to October 7th, 1891, what did you refer to?
A. I referred to the notes.
Q. State whether or not you had any reference to this assignment marked "Ex. 16."
A. That accompanies the notes and mortgage.
Q. My question is this: Whether you had reference to that yesterday forenoon when you stated that the bank had owned the notes for some time prior to Oct. 7th, 1891?
A. I don't know whether I had the assignment of the mortgage in mind at that time or not; that is a part of the seven-thousand deal; that assignment, together with the mortgage and notes, constituted the papers in the deal.

(Letter is marked "Ex. 18.")

Q. Have you seen this letter before?
A. Yes; I wrote it and signed it.

32 Plaintiff offers in evidence "Ex. 18," and the same is received in evidence, being letter as follows:

"GRAND FORKS, N. D., *April 6th*, 1891.

Alexander Anderson, Seattle, Washington:

Inclosed find the notes, seven, $1,000 each, for your endorsement; also an assignment of the mortgage for you to execute. This paper was sent us by Mr. E. C. Bates. We wrote him we would make you a loan of $2,000 with this as collateral, eight months, twelve per cent. discount. Sign inclosed note to this bank, $2,000. On receipt of the notes, having your signature on the back of each, the assignment properly executed and your signature to the $2,000 note, we will send a draft for proceeds.

Yours, S. S. TITUS, *Cashier*."

Q. Mr. Titus, you may state whether or not this correspondence commencing in August, 1891, and ending October 7th, 1891, is all the correspondence had between you and the plaintiff or between the defendant bank and the plaintiff in regard to the seven promissory notes in suit?
A. It is all I have any record of.
Q. Do you know the signature of Mr. Alexander Anderson to this assignment, "Ex. 16"?
A. I think it is Mr. Anderson's signature.

(Notes marked "Ex. 19" and "Ex. 20.")

Q. Are these notes marked "Ex. 19" and "Ex. 20," respectively, two of the seven thousand dollars of promissory notes that we have mentioned?

A. They are.

Q. "Ex. 19" and "Ex. 20" offered and received in evidence without objection, and are the last two notes of the series of seven notes described in the complaint, due, respectively, December 1st, 1896, and December 1st, 1897, both endorsed "Alexander Anderson," and with interest payments endorsed each year, the last endorsement being: "Int. paid to Dec. 1st, 1896." The notes are payable to the order of the plaintiff, and the interest payable annually at the rate of nine per cent. per annum until fully paid.

Q. Has the defendant any of those notes except these two?

A. No, sir.

33 Q. What has become of the others?

A. They have been paid.

Q. Were the other notes of the series besides these two of the same general tenor, one being due one year earlier each time?

A. I presume so; the mortgage describes them.

"Ex. 21" is here offered and introduced in evidence, being plaintiff's letter of October 13th, 1891, appearing in paragraph "VIII" of the defendant's answer, stating that he cannot accept defendant's remittance, and that he shall expect balance of money by return mail, etc., and witness testified that he received it at Grand Forks in the due course of mails.

Cross-examination of S. S. TITUS by defendant, this plaintiff in error:

I do not remember seeing Mr. Anderson until after October 7th, 1891.

Q. You spoke about having met him lately; when did you meet him?

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, having nothing to do with the matter in controversy, not the best evidence, no foundation laid, and not part of the *res gestæ*.

Counsel for defendant stated that Mr. Titus went to see Mr. Anderson.

Plaintiff objects and stated that if he has any offer to make that it be made in writing.

COUNSEL FOR DEFENDANT: We expect to prove admissions on the part of Mr. Anderson since the last trial, some time in December, 1895.

Plaintiff objects as to any admissions made after the fall of 1891; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness, S. S. Titus, that during the latter part of December, 1895, S. S. Titus saw the plaintiff personally and had a conversation with the plaintiff Anderson at

Seattle, Washington, in relation to the notes and the transaction in controversy, and that in said conversation the plaintiff admitted to said S. S. Titus that the plaintiff never considered the defendant as his agent; that he denied the agency and refused to allow
34 thirty-five dollars commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner.

The plaintiff objects to this offer on the ground that it is incompetent, irrelevant, and immaterial, not the best evidence, no foundation laid, and calling for the parol evidence tending to contradict the terms of a written contract of agency entered into between plaintiff and defendant by means of letters and telegrams already introduced in evidence; calling for the conclusions of the witness and improper cross-examination; which said offer is rejected by the court; to which ruling the defendant, by its counsel, duly excepts.

I know Mr. Phelps, the attorney for the plaintiff in this action; have known him about ten years. He called to see me in relation to this transaction before the commencement of this action.

Q. Did you have a conversation with him in relation to this case and the transactions out of which this litigation arose?

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial, unless it is shown that the conversation sought to be introduced occurred before this contract—the correspondence which constituted the contract—was completed, and is improper cross-examination; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Plaintiff rests.

The defendant now moves the court to strike out Exhibit "E" of the deposition of Alexander Anderson, also identified as Exhibit "11" in this case, as incompetent, irrelevant, and immaterial; not shown to have been the act of the defendant, but *ultra vires*; not tending to prove any of the issues in this case or any allegation; which motion is denied by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant's Case.

S. S. TITUS recalled by defendant:

Witness continued: I am acquainted with Mr. H. W. Phelps, the gentleman sitting there, attorney for plaintiff. I had a con-
35 versation with him prior to the commencement of this action in reference to these notes at the First national bank. He was in two or three times to see about the paper; he made demand on me for the money in connection with this same matter.

Q. In the course of that conversation was anything said by you and Mr. Phelps as to who was the owner of the paper?

Plaintiff objects, as a declaration in the defendant's own interest and not tending to prove any demand by the plaintiff.

COUNSEL FOR DEFENDANT: We offer this for the purpose of showing the plaintiff, through its counsel, Mr. Phelps, had knowledge at the time the action was brought, and knew that the defendant owned the paper and claimed to own it.

The objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant's counsel offers to prove by this witness that he had a conversation with the plaintiff's attorney, Mr. Phelps, at the time when this subject was under discussion between them, and that said attorney was at the time acting for and on behalf of the plaintiff in the action; that the witness stated to him that the bank was the owner of the paper, the subject-matter in dispute.

Plaintiff objects to the offer on the grounds before stated. The offer is rejected by the court; to which ruling the defendant, by its counsel, duly excepts.

Exhibit "25," a letter, as follows:

MINTO, NORTH DAKOTA, *Dec.* 1*st*, 1892.

S. S. Titus, cashier, Grand Forks, N. D.

DEAR SIR: Enclosed find my check for ten hundred fifteen dollars ($1,015.00), same to pay your note No. 17947, given by John A. Willson and wife and Warren to Anderson, now held by you.

Willson claims he paid you interest last year to December 1st, 1891, on all the notes, and this year to December 1st, 1892.

If he is correct, I am sending you $15.00 too much. Send the note to me.

Yours truly, J. D. PHELPS.

36 was identified by H. W. Phelps as being in the handwriting of J. D. Phelps, and H. W. Phelps further testified that the firm of Phelps & Phelps, plaintiff's attorneys, was composed of H. W. Phelps and J. D. Phelps.

Witness Titus resumed: Exhibit "25" was received by defendant bank in due course of business.

Defendant offers Exhibit "25" in evidence; to the introduction of which the plaintiff objects upon the ground that it is incompetent, irrelevant, and immaterial, as it appears that the writer was acting in behalf of John A. Willson and not acting in behalf of the plaintiff, Alexander Anderson, in the subject-matter; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, I believe you have stated that since the last trial you met Mr. Anderson at Seattle, Washington. Is that correct?

A. Yes; I met him.

Q. Did you have any conversation with him at that time upon the subject-matter in litigation?

Plaintiff objects to this question upon the ground that it is in

competent, irrelevant, and immaterial, tending to introduce paro evidence to vary the terms of a written contract; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that he personally saw plaintiff Anderson at Seattle, Washington, in December, 1895, after the last trial, and that plaintiff then admitted to witness that he had never considered either Titus or the bank as his agent; that he had always denied such agency, and refused to allow $35.00 commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner.

Plaintiff objects to this offer on the ground that it is incompetent, irrelevant, and immaterial, not the best evidence, no foundation laid, and calling for parol evidence tending to contradict the terms of a written contract of agency entered into between plaintiff and defendant by means of letters and telegrams already introduced in evidence, calling for the conclusion of the witness; which
37 objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, was the defendant bank ever the agent of the plaintiff for the sale of the notes in litigation?

Plaintiff objects to this question upon the ground that it is calling for the conclusion of the witness, not the best evidence, calling for parol testimony to vary the terms of a written contract; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The witness was then asked successively each of the following questions; to each of which plaintiff objected on the same ground as last above, and each objection was sustained by the court; to each of which rulings the defendant duly excepts and now assigns as error:

Q. Did the defendant bank ever attempt to act as agent for Mr. Alexander Anderson, the plaintiff in this action, or sell or offer to sell, as agent of Mr. Alexander Anderson, the notes described in the plaintiff's complaint to itself?

Q. Did you yourself ever undertake to act as agent for Alexander Anderson for the sale of notes in litigation to the bank?

Q. Did the defendant, from the correspondence and letters or telegrams that passed between the plaintiff and the defendant bank in this action and all communications, believe that they were buying the paper directly from the plaintiff in this action, and that the plaintiff was selling the same directly to the defendant?

Q. That all communications from the plaintiff to the defendant were understood and believed by the defendant to be so intended by the plaintiff?

Q. Mr. Titus, did you believe from the telegrams sent by the plaintiff to the bank October 5th, 1891, that the plaintiff intended to sell said notes to the bank for $6,500.00, less $2,000.00 notes held by the bank and the expenses of clearing the title to the land?

Q. Did the defendant bank understand from the the telegram of October 5th, 1891, that it was the intention and understanding of the plaintiff to sell the seven promissory notes mentioned in the complaint to the defendant for $6,500.00, less the plaintiff's notes of $2,000.00 to the bank?

38 Q. Did the plaintiff ever return or offer to return to the defendant bank his own note of the $2,000.00 or the draft that was transmitted, for something over four thousand dollars, to him?

Plaintiff in this action objects to this question upon the ground that it is incompetent, irrelevant, and immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant now offers to prove by this witness all facts set out in paragraph eleven of its answer to the amended complaint; to which offer the plaintiff objects upon the ground that it is calling for a conclusion of law, not the best evidence, and calling for parol testimony to vary the terms of a written contract between the plaintiff and defendant; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Witness continued: I know R. M. Sherman; knew him about October, 1891. He was acting secretary of the Vermont Loan & Trust Company, doing business at Grand Forks and Spokane Falls, Washington. He then resided at Spokane Falls, Washington, and was visiting Grand Forks at that time. Prior to that time I made the deal with Anderson for this paper. August 31st, 1891, R. M. Sherman proposed to buy the seven notes in controversy from the bank if the bank could procure Anderson's interest therein, and that he was the person that the witness Titus referred to when he wrote the telegram of August 31st, 1891: "If accepted now, a party is here, so we can send $4,000, together with your note, you to make the title good if anything comes up; answer by wire at once."

Defendant now offers to prove by this witness that upon the idea of selling these notes by the bank to R. M. Sherman they had the correspondence with the plaintiff and all the correspondence that was had with the plaintiff with the view not to act as agent for the plaintiff, but to purchase the plaintiff's residuary interest in the notes and then sell the entire notes to Mr. Sherman.

The plaintiff objects to the offer upon the ground that it is incompetent, irrelevant, and immaterial, calling for parol evidence to vary the terms of a written contract, and not the best

39 evidence, and calling for a conclusion of the witness; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Q. Mr. Titus, did you fail to sell the paper to Mr. Sherman?

A. I did.

Q. What was the trouble between you and Mr. Sherman as to why you failed to sell it to him?

Plaintiff objects to that question upon the ground that it is im-

material; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that R. M. Sherman insisted that the bank should guarantee the payment of the notes, and the bank declined to guarantee the payment of the notes absolutely, and for that reason the notes were thrown back upon the bank and they were held by them ever afterwards.

Plaintiff objects to the offer as immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

J. WALKER SMITH testified: I am and was during the whole year 1891 president and a director of The First National Bank of Grand Forks, North Dakota, the defendant, and as such president and director presided at each and every meeting of the board of directors of the defendant bank held that year. I have in my possession and have examined the minutes of the various meetings of that board for that year.

Q. I would ask you, Mr. Smith, if the board of directors of The First National Bank of Grand Forks, North Dakota, the defendant, in any way ever authorized Mr. Titus to act for and in behalf of the bank, constituting the bank thereby the agent of Alexander Anderson, the plaintiff in this action, for the sale of the notes in litigation.

Plaintiff objects to this question upon the ground that it is incompetent, irrelevant, and immaterial; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The defendant offers to prove by this witness that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the bank, constituting the bank the agent of Alexander Anderson, the plaintiff in this action, for the sale of the seven promissory notes in litigation in this action.

The plaintiff objects to this offer upon the ground that it is incompetent, irrelevant, and immaterial, and the defendant is estopped from questioning the agency of the defendant in acting for the plaintiff; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

The defendant also offers to prove by this witness that the board of directors never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, as the agent of Alexander Anderson for the sale of the paper in litigation, the seven promissory notes.

To this offer the plaintiff objects upon the grounds same as last above; same ruling and exception by the defendant.

JOHN BIRKHOLZ, called as a witness on behalf of defendant, testified:

I reside and have for fourteen years past *have* resided at Grand Forks, North Dakota, and have there been engaged all that time in

the business of lending money, and am familiar with the character of land in different townships in Grand Forks county, and of lands in the township in which the lands mortgaged to secure the seven notes is situated, and know the value of the N. E. 5–154–53; examined the mortgage securing these seven notes; am familiar with the values of instruments of that kind.

Q. I would ask if you know what the value of that mortgage and the paper secured thereby was in the market at Grand Forks, North Dakota, in August, 1891.

Plaintiff objects to this question as incompetent, irrelevant, and immaterial, calling for the conclusion of law, and not the proper method of proving the value of chose in action under the decisions of the territorial supreme court; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove by this witness that he was examined as a witness on behalf of the defendant at the former trial of this case in relation to these notes and mortgage, and became familiar with the notes and mortgage and the securities and is familiar with them, and that he knows their value and knows their actual
41 value, and what the value of the notes was on October 7th, 1891, and knows their value on that day and all times since, and that it was not to exceed the sum of $6,000.00.

To which offer the plaintiff objects upon the ground that it is incompetent, irrelevant, and immaterial, and calling for a conclusion of law and not the proper method of proving the value of choses in action; which objection is sustained by the court; to which ruling the defendant, by its counsel, duly excepts.

Defendant offers to prove same facts by witnesses Fulton, Clifford, and Lander, then in the court-room; same objection and ruling and exception.

Defendant rests.

The defendant renews the motions made at the close of the plaintiff's case and in the same form, and the same objections are interposed by the plaintiff; same ruling by the court; to which ruling the defendant, by its counsel, duly excepts.

The plaintiff now moves the court to direct a verdict for the plaintiff for the sum of $1,705.85, being the difference between the *prima facie* value of the notes and defendant's remittance of $6,397.48, made by the defendant to plaintiff October 7th, 1891, by way of draft, and the plaintiff's own $2,000.00 note, being the balance of $1,243.02, with interest from October 7th, 1891, at the rate of seven per cent. per annum, up to the present time, on the ground that the defendant in this action was the plaintiff's agent for the sale of the seven notes mentioned in the complaint to a third party on October 7th, 1891, and that, as alleged in the complaint, the defendant sold these notes to itself, and thus converted the notes to its own use, and has remitted to the plaintiff, out of the total value, only the sum of $6,397.48, leaving a balance of $1,243.02, with interest due plaintiff thereon from the 7th day of October, 1891, to the present time.

The defendant now moves the court to submit to the jury the question whether or not the defendant bank ever entered into a contract with the plaintiff, whereby it undertook and engaged to act as the agent of the plaintiff for the sale of these notes, or as
42 agent for the plaintiff in any manner, in connection with these notes; which motion is denied by the court.

Motion of the plaintiff before stated for a direction of a verdict for plaintiff is granted by the court; to which ruling the defendant, by its counsel, duly excepts.

Pursuant to which decision the jury returned the following verdict:

"We, the jury in the above-entitled action, find for the plaintiff and against the defendant, and assess plaintiff's damages at the sum of $1,705.85, seventeen hundred five and $\frac{85}{100}$ dollars.

Dated February 3rd, A. D. 1897."

Specifications of Error on Motion for New Trial in District Court of North Dakota, Anderson vs. Bank.

Defendant specifies as errors upon which it relied in the further proceedings in the above-entitled case each of the several rulings of the court set out in the foregoing portion of this statement of the case to which exceptions were taken by the defendant and entered and which for the sake of brevity are not included here, but now specified respect*fully* as errors 1 to 141, inclusive.

Defendant further specifies as errors upon which it relies the following rulings of the court:

144.

The court erred in overruling, on February 2nd, 1897, the defendant's written exceptions, dated January 30th, 1897, to specific interrogatories, answers, and exhibits of said deposition; all of which were made a part of the record February 2nd, 1897.

145.

The court erred in admitting Exhibit "A," the paper received by plaintiff at Seattle, written by the telegraph operator there, and purporting to be the receiver's copy of a telegram dated October 3rd, 1891, signed First national bank, for the reasons set out in the written exceptions to the deposition and to this specific ex-
43 hibit and the oral objections interposed when offered on trial, shown as assignment of error No. 22, and because of variance from the telegram alleged, not connected with defendant, no evidence of the identity or authority of the writer or sender, if any; does not tend to prove the sending of the alleged telegram, and the agency, if established, would be *ultra vires* and the act of any officer contracting that the bank would act as agent would be *ultra vires.*

147.

The court erred in admitting Exhibit " E " attached to the deposition, being the letter of September 14th, 1891, for the reasons set out in defendant's written exception to the deposition and this specific letter and in the oral objections to it when offered on the trial, as set out on page — of this statement.

151.

The court erred in excluding testimony of S. S. Titus to admissions and statements made by plaintiff at Seattle in December, 1895, that he did not consider defendant his agent for the sale by defendant as agent, but a direct purchase and sale from plaintiff to defendant, and the further evidence of Titus as to the understanding he had of the transactions, and the construction which the parties to the transaction had themselves placed upon the correspondence, and upon which both acted in the transaction as one of direct sale and not of agency, because the construction which was placed by the parties themselves upon the letters and upon which they acted in the transaction determines whether there was a wrongful conversion of the notes, this being an executed contract and not an executory one, and the defendant not seeking the enforcement of the terms of the contract, but seeking to recover for an alleged violation of the contract by an act done with his knowledge and consent, and according to the terms of a contract as understood and intended by himself.

152.

The court erred in excluding the evidence of Birkholz, Fulton, Lander, and Clifford as to the value of the notes, because in this case, on a contract involving the value of notes having from
44 one to six years to run and having a definite and well-established marked value, and which could be replaced by equivalent paper for a known price, there was no conclusive presumption that the paper was worth the face and accrued interest.

154.

The court erred in excluding the testimony of J. Walker Smith, that no authority was conferred upon any officer to nor was any steps taken whereby the defendant bank could engage to act as agent for the sale of these notes or otherwise, because any contract to that effect is *ultra vires* and not within the implied or customary powers of officers of a national bank.

Dated this 19th day of March, 1897.

BURKE CORBET,
Attorney for Defendant.

Order Refusing New Trial.

On this 12th day of May, 1897, this cause coming on regularly for hearing, upon the motion of defendant to vacate and set aside the verdict of the jury returned upon the trial of said cause at the

adjourned December, 1896, term of said court, holden at the said county February 2nd, 1897, and subsequent days, and to order a new trial of said action—

It appeared to the court that due and proper notice of intention to move for a new trial had been by defendant duly served upon plaintiff; that a full, complete, and proper statement of the case had been, upon due notice and proper proceedings, duly settled by the court and filed, and that due notice of the hearing of the above notice had been served by defendant upon plaintiff, plaintiff expressly and in writing having waived time, and all other further notice of said motion, and consented to the hearing and determination of said motion forthwith, and the parties accordingly appeared, the plaintiff by Phelps & Phelps, his attorneys, and the defendant by Burke Corbet, its attorney, and submitted the motion upon the record and the statement of the case aforesaid, and the court, being duly advised, finds that said motion for a new trial should be denied.

45 It is therefore hereby ordered that said motion be, and the same is, overruled and denied.

Dated May 14, 1897.

By the court:

C. J. FISK,
Judge of the District Court.

And June 3rd, 1897, judgment was rendered and entered in said case as follows:

Judgment on Trial.

This action having been regularly placed upon the calendar for trial at the December (1896) term of the district court, begun and holden at the court-house, in the city of Grand Forks, N. D., on the first day of December, A. D. 1896, and having been reached in its regular order for trial, plaintiff appearing by Phelps & Phelps, his attorneys, and defendant by Burke Corbet, its attorney, and a trial by a jury having been had on the 2nd and 3rd days of February, 1897, and the jury having, on the 3rd day of February, 1897, rendered a verdict in favor of the plaintiff and against the defendant for the sum of seventeen hundred and five and $\frac{85}{100}$ dollars ($1,705.85), and the court having ordered judgment in accordance with said verdict, and for the costs and disbursements herein, to be taxed by the clerk:

Now, therefore, on motion of Phelps & Phelps, attorneys for said plaintiff, it is adjudged and determined that said plaintiff do have and recover of the said First National Bank of Grand Forks, North Dakota, defendant, the said sum of seventeen hundred and five and $\frac{85}{100}$ dollars, and the sum of thirty-nine and $\frac{80}{100}$ dollars, interest on said verdict, together with the costs and disbursements of this action, taxed and allowed at the sum of one hundred and sixty-eight and $\frac{75}{100}$ dollars, making a total judgment of one thousand nine hundred fourteen and $\frac{40}{100}$ dollars ($1,914.70).

Witness the Hon. Charles J. Fisk, judge of said district court, and

my hand and the seal of said court, this 3rd day of June, A. D. 1897.

[District Court Seal.]

L. K. HASSELL, *Clerk.*

Date of appeal to the supreme court of North Dakota: July 17th, 1897.

46 *Assignments of Error on Appeal to the Supreme Court of North Dakota.*

I.

Under the amended rules of this court, the supreme court of North Dakota, Rule XII, appellant does not quote or duplicate its specifications of error as set out in the statement of the case, but appellant relies upon the same as assignments of error, and by reference herein makes such specifications and each thereof and the specifications of particulars wherein the evidence is insufficient to sustain the verdict and the order directing the verdict a part of this its assignment of errors.

II.

Appellant further says that there was manifest error in the order overruling appellant's motion for a new trial for the reasons set out in the specifications of errors, set out in the statement of the case, and for the reasons stated as grounds for appellant's several objections and motion on the trial, and for the exclusion and admission of evidence and insufficiency of evidence.

III.

Appellant further says there was manifest error in rendering judgment against appellant in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States to national banks against liability on account of *ultra vires* acts of their officers and *ultra vires* contracts of the banks themselves.

Dated August 10th, 1897.

BURKE CORBET,
Attorney for Defendant.

In Supreme Court, State of North Dakota, September Term, 1897.

Alexander Anderson *vs.* First Nat. Bank of Grand Forks, 72 N. W. Rep., 916, '19, '20, & '21.

All objections to depositions, except for incompetency or irrelevancy, must be taken before the trial is commenced or they are forever waived.

47 "The construction of a written agreement is a question of law for the court, and therefore, ordinarily, it is incompetent

to prove what either party to a written contract considered its meaning or its legal effect."

"Questions decided on the former appeals in this case reaffirmed."

The promissory notes of individuals have no market value, and evidence of their market value is therefore incompetent. Witnesses are not permitted to testify generally as to the value of such paper, but must confine their evidence to facts which bear upon the question of value. The insolvency of the maker, the fact that the paper is not secured, or that the security is inadequate, the existence of a defense to the paper, and other facts of a like nature affecting the value of such paper may be proved; but mere opinions as to value are not competent. This is the rule, not only in actions for conversion of such paper, but also in actions in which the party injured waives the tort and sues in assumpsit for the value of such paper on the theory of a sale.

Prima facie a chose in action is worth what appears to be due upon it, and unless the presumption is rebutted by legal evidence, it is conclusive.

(*Syllabus by the Court.*)

CORLISS, *C. J.:*

This cause, having been tried four times in the district court, is before us a fourth time on appeal. On the last trial the trial court directed a verdict for plaintiff for the amount due upon the notes at the time of their conversion by defendant, less the sum that had beed paid by defendant to plaintiff by a remittance to plaintiff, on the theory that it was remitting the proceeds of a sale thereof by defendant as agent for plaintiff. In its main features the case is practically the same as on the last appeal. There is only a slight difference in the facts; none calling for any change of decision on the points already disposed of. The answer, as before, puts in issue the question of agency; but the undisputed facts conclusively establish such agency. It is true that the offer by plaintiff of one of the telegrams which had been repeatedly received in evidence on the former trials was strenuously objected to, and it is here
48 urged that such telegram was not proved by competent evidence. This is the telegram from defendant to plaintiff dated October 3d. We may strike this from the record, and yet there remains unanswerable proof of agency. Defendant's letter of September 14th contains an offer by defendant to act as agent for plaintiff in the sale of the notes in question. This letter embodies the following statement: "If I had a basis to work on, I might find some one who would take the paper. You offered it at a $350 discount. We offered you a trade at a $1,000 discount. Now, if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you." Defendant's letter to plaintiff of October 7th reports a sale of the notes by defendant as agent for plaintiff, the sale purporting to have been made by defendant in answer to a telegram from plaintiff to defendant offering to sell at a certain discount. This telegram was in answer to defendant's

proposition to sell the paper, as agent for plaintiff, for a small commission. In this letter of October 7th defendant charged plaintiff a commission of $35 for making the sale. In view of these uncontroverted facts, it becomes unnecessary for us to determine whether there was error in receiving in evidence the telegram of October 3d. Eliminating it from the case does not in the least affect the question of agency.

Some new questions are presented to us for consideration. Among them is the question of the admissibility of certain evidence offered by defendant to prove the value of the notes in question. This evidence was the opinion of experts. *Prima facie* the value of these notes, both at common law and under our statute, was the full amount due thereon at the time of the conversion thereof by defendant. Rev. Codes, sec. 5012; Comp. Laws, sec. 4615. Several witnesses were called by the defendant, and defendant offered to prove by their testimony what the value of such notes was, and that the value thereof did not exceed the sum of $6,000. This evidence, being objected to by plaintiff, was excluded, and it is here urged that in so doing the district court committed error. It is to be noted that no attempt was made to show the insolvency of the makers of these notes, or that there was any defense to them, or that any portion thereof had been paid. Indeed, it was established on the trial and does
49 not appear to be disputed that the land on which these notes were secured by a mortgage was of greater value than such notes. No evidence tending to show that the security was insufficient was offered by defendant, despite the fact that the witnesses who testified on its behalf swore that they knew the value of the land. The case before us therefore is the case of notes executed by solvent makers, amply secured, subject to no defense, and on which the full amount of principal was due, together with some accrued interest. These notes bear a good rate of interest, even for North Dakota, the rate being 9 per cent. To allow witnesses to conjecture about the future solvency of the parties, to speculate about the possible decline in the value of the security, and on such a basis express an opinion—a mere guess—as to the value of the paper, would be a dangerous doctrine. Paper of this character, unlike chattels and municipal, State, and national bonds and corporate stock, is not generally bought and sold in the market and cannot be said to have a market value. There may at times be local dealings in such securities of considerable magnitude, but we must establish the rule to apply to all communities in the State and under all circumstances. We do not think that the fact that there were at the time of the conversion of this paper a large amount of individual notes bought and sold in commercial circles in Grand Forks city furnishes any reason why we should establish a rule that such paper has a market value, when we well know that, taking the State at large and considering the general trend of business, there is a wide distinction between chattels and such securities as marketable property. The chief dealing in paper of this kind is at the banks and loaning institutions, where money is borrowed by debtors upon their notes, secured or unsecured. Such paper is not sold in open

market, as wheat or municipal securities or other like property. There is therefore no standard of value to apply to it, except that which each witness creates in his own mind, basing his opinion, perhaps, upon what he would give for the property, or on a conjecture as to the future solvency of the maker. In this particular case the foundation of the opinions of the experts as to the value of these notes would seem to be the risk of the future insolvency of the makers thereof. Defendant offered to prove by any one of its
50 witnesses "that the risks of the insolvency of the makers of negotiable instruments which are to become due in one, two, three, four, and five years is a material element in depreciating the value of the paper, notwithstanding the fact that the parties may be perfectly solvent at the time of making or at any particular time thereafter; that the risk of insolvency itself is an element which does actually depreciate the value of the paper." Had this witness been permitted to express his opinion as to the value of these notes, we know that it would have rested largely upon the remote possibility of the future insolvency of the makers, although as a matter of fact the notes were adequately secured and were therefore good without reference to the solvency of such makers. Extreme cases can be imagined where the rule which we follow in this case may work some slight measure of hardship, but in the great majority of instances—indeed, in practically every case—it is the only rule which will not result in placing the owner of choses in action at the mercy of every wrong-doer and the surmises and guesses of persons who really know nothing about the market value of such property, because as a rule it has no market value. Would-be wrong-doers can protect themselves against this rule, if they deem its operation harsh, by keeping their hands off the property of others. Persons who buy such property can protect themselves by an agreement as to the price to be paid. The cases fully support our decision on this point. In fact, no ruling to the contrary can be found. Holt *vs.* Van Eps, 1 Dak., 208; 46 N. W., 689; Booth *vs.* Powers, 56 N. Y., 22; Atkinson *vs.* Printing Co., 43 Hun., 167; Potter *vs.* Bank, 28 N. Y., 654. In Potter *vs.* Bank the court said: "It was insisted on the trial that the proper question to put to the witness, in order to arrive at the measure of damages, was, 'What was the value of the note?' And the ground on which the right to put the question is that such is the inquiry of all of the cases where the value of property is sought to be recovered. The general rule is that the value of property must be ascertained by answers to the direct questions as to its value, and the reason is that persons are examined who know its value and can speak from their own personal knowledge in relation thereto; but this rule cannot apply to choses in action that have no intrinsic
51 value, as a horse or an acre of land has. Their value depends on the pecuniary condition of the parties liable thereon, and hence, in such case, the direct and proper inquiry would be, 'Are the parties to the bill or note or other chose in action solvent and able to pay their debts?' But, as the law presumes that fact in favor of the plaintiff, it is not necessary that he prove it, and the burden is

therefore cast upon the defendant to disprove it." Nor do we think that there is any reason for applying a different rule to this case because of the fact that plaintiff has elected to waive the tort and sue in assumpsit, on the theory of an executed contract of sale complete in all its terms save with respect to the purchase price to be paid. It is the defendant's duty to pay the full value of these notes as much in this form of action as it would be in an action for conversion. The reason for the rule that in actions for conversion the market value cannot be proved is that, generally speaking, such property has no market value. This reason exists precisely the same in an action to recover the value of such property on the theory of a sale without an agreement as to the purchase price; nor was anything to the contrary decided in Barrington *v.* Bank, 14 Serg. & R., 405. The danger of permitting opinion evidence as to value in this class of cases is illustrated by the facts of this case. Here is paper of perfectly solvent makers, amply secured, bearing a large rate of interest, and the full amount due thereon at the time of the conversion by the defendant was $7,630, and yet defendant offered to prove by its experts that these notes were then worth only $6,000, and this, too, in the very teeth of the fact that five of the seven notes, together with the interest thereon, had been at that time fully paid to the defendant. It is hard enough for plaintiff to lose the difference between 9 and 7 per cent. interest (he being entitled to only 7 per cent. interest since the day of the conversion of the notes, although the defendant has collected, and will continue to collect, interest at the rate of 9 per cent.) without being required by law to throw away $1,630 on the bare conjecture of witnesses.

Certain objections were made to the deposition of plaintiff.
52 They came too late. That deposition was read without objection on the first and second trials of this case. After the first trial had been entered upon without any objections being made, all objections other than for incompetency or irrelevancy were waived. Comp. Laws, sec. 5299; Rev. Codes, sec. 5687. The evidence of the plaintiff contained in this deposition was objected to on the last trial on the ground that it was incompetent and irrelevant. Much of the testimony was clearly relevant, and all of it was competent except that which related to the value of the notes. If we should strike this testimony out of the case, we would still have left the statutory and common-law presumption that the notes were worth their face, and unless this was rebutted by legal evidence, or unless there was an offer of legal evidence to overthrow it, the trial court was justified on the basis of this presumption, unaided by plaintiff's testimony as to value, in directing a verdict for plaintiff for the face value of such notes. Some of the facts to which plaintiff testified were undisputed; others were admitted by defendant's cashier on the witness stand, and plaintiff's testimony as to value merely corroborated the presumption of the law that the notes were worth their face. If competent evidence as to value, tending to reduce their value below the amount due thereon, had been received or offered, the question must have been submitted to the jury, and the case would have to be reversed for error in refus-

ing so to do, without reference to the question whether plaintiff's evidence as to value was competent or not. If, on the other hand, defendant offered no legal evidence tending to overthrow the presumption of the law, then, without plaintiff's evidence as to value, the state of the evidence on that point called for the direction of a verdict in favor of the plaintiff for the full sum due upon the paper at the time of the conversion thereof. As we will demonstrate later, the court in effect struck out the plaintiff's testimony as to value, so that defendant's objection was in fact sustained. It is not practicable to discuss in detail all the objections made to the plaintiff's evidence in the deposition referred to. We will merely state our conclusion that no prejudicial error appears to have been committed by the court in overruling such objections.

53 It is urged that by the change of the issues resulting from plaintiff's amendment to his complaint after the deposition was taken defendant was deprived of its right to cross-examine the plaintiff, the importance of his evidence under the present issue not being in some respects manifest as the issues then stood; but defendant has not applied for an order to be allowed to cross-examine, or that in default thereof the deposition be suppressed. In the exceptions filed to the deposition defendant did not ask that the privilege of cross-examination be accorded it. It merely insisted that the whole deposition should be suppressed. This was the motion it made on the basis of its exceptions before the trial commenced. The whole deposition cannot be suppressed merely because by reason of some change in the issues a party ought to be permitted to cross-examine on some point or object to a portion of the evidence. Only one new question was brought into the case by the amendment to the complaint which would make it important to cross-examine the plaintiff on one point to which he testified. In the original complaint the question of agency was involved as the very basis of the action. The suit was to recover from the defendant the proceeds of a sale by it of the notes in question to a third person as agent for the plaintiff. The defendant admitted the agency and interposed the defense that it had made the sale for the sum specified in the instructions of the plaintiff to it, and had fully accounted for the proceeds thereof. So far as the question of agency was concerned, the complaint stands unchanged; but the question of value was not of any importance under the complaint as it originally stood, and it is vital now. If, however, we expunge from the record the plaintiff's evidence in this respect, there remains the *prima facie* case, calling for the direction of a verdict for the face value of the paper, there being no countervailing evidence in the record; and, as we shall see, the court did in effect strike out the plaintiff's testimony as to value. But it may be urged that a cross-examination of the plaintiff on the question of value would have forced from him testimony that the paper was worth less than its face, and that therefore the defendant has been denied a right for which the expunging of the evidence from the case will not compensate it. It may be claimed

54 that by such cross-examination the defendant might have overthrown the *prima facie* case made by the papers them-

selves. But the evidence of plaintiff, in which he stated his opinion of the value of the paper, was incompetent, and, as we shall see, was in effect stricken from the case. Any cross-examination along the same lines must, of course, have fallen with the direct examination on which it rested. Had the defendant cross-examined the plaintiff in this respect the court must have stricken out the cross-examination containing his expression of opinion as to value, as well as his direct examination on that point. So far as plaintiff's deposition contains testimony as to the value of the land, the error, if any, in not permitting the defendant to cross-examine as to this item of evidence or object to it is without prejudice, for the reason that defendant does not deny, but, on the other hand, practically admits, that the security was adequate; and, even if it were inadequate, the value of the notes would not in law be thereby affected, the makers being solvent.

On the trial defendant offered to prove that plaintiff's attorney knew that defendant was the owner of the notes before this action was commenced; but this was not an offer to prove that plaintiff or his attorney then knew that the defendant had in violation of its duty to plaintiff sold the notes to itself. The fact offered to be proved was entirely consistent with the subsequent purchase of the notes by the defendant; and this was the most natural inference to be drawn by the plaintiff, because he would not have readily concluded that the defendant had not stated the truth in its letter of October 7th, in which it reported and charged a commission for the sale of the paper to a third person. Had the defendant offered to show that plaintiff or his attorney knew before commencing the action that defendant had sold the notes to itself, such offer would have disclosed a defense to the action, for it is undisputed that plaintiff originally sued on a theory of a sale of the notes by defendant, his action being to recover the proceeds of such sale. If, with knowledge of the breach of duty by the defendant, and consequently that the plaintiff might at his option repudiate the transaction and hold the defendant responsible for the value of the
55 paper or recover the paper itself, the plaintiff had elected to treat the conduct of the defendant as legal and ratify the sale by essaying to recover the proceeds thereof, he would have been forever debarred of the right to hold the defendant liable on any other theory, and especially on a theory bottomed on the illegality of the defendant's conduct. This principle was recognized in our decision of this case on the second appeal. See 5 N. D., 80–88; 64 N. W., 114. But the offer was not to show that plaintiff or his attorney knew before bringing suit that the defendant had sold to itself, but merely that, at a time subsequent to the sale of the paper by defendant, plaintiff knew that defendant was the owner thereof. Nor did defendant offer to prove this fact as tending to show that plaintiff knew that the defendant sold to itself, but solely for the purpose of establishing the fact that plaintiff knew before suing that defendant did in fact own the paper. In making the offer counsel for defendant said: "We offer this for the purpose of showing that plaintiff, through his counsel, Mr. Phelps, had knowledge at the time the ac-

tion was brought and knew that the defendant owned the paper and claimed to own it." The defendant offered to prove by its cashier that he had a conversation with plaintiff in December, 1895, which was subsequent to the third trial of this case, and "that plaintiff in such conversation admitted to the witness that he had never considered either Titus or the bank as his agent; that he had always denied such agency and refused to allow $35 commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner." It is obvious that this offer is merely to prove what plaintiff's construction of the correspondence between him and defendant was. That correspondence constituted a contract, which we have held as a matter of law created the relation of principal and agent. It is well settled that the construction of a written agreement is for the courts, and that neither party thereto can be permitted to control the meaning of such contract by an expression of his understanding of it. Had the defendant sold the notes to a third person and sued plaintiff for the small commission or deducted the amount thereof from the proceeds of the sale, plaintiff would not have been permitted to insist that he
56 did not understand that defendant was acting as his agent. The writing would have controlled.

It is a matter of no moment that the contract is contained in several letters and telegrams instead of in a single paper. When all are taken together they constitute the written agreement of the parties, precisely the same as if they were all embodied in one instrument. All the defendant offered to prove was that the plaintiff stated his view of the legal effect of the agreement between himself and defendant. His alleged admission is not equivalent to a consent that defendant should purchase the paper. By bringing the action, or, rather, by amending his complaint as soon as he discovered the facts, he evinced a purpose not to permit the defendant to purchase the paper, but to treat its attempted purchase thereof as unlawful. Undoubtedly the plaintiff might, despite the agency, have consented that the agent should buy at a specified figure, and if defendant after making the purchase had informed plaintiff of the fact, the latter could have elected to ratify the transaction; but the offer was not to prove such facts, but merely that plaintiff's view of the agreement was that it did not establish the relation which it actually did establish. Plaintiff would not have been permitted to prove his understanding of the legal effect of the correspondence to defeat defendant's right to commissions; neither can defendant prove it to escape the duties which the law casts upon it because of such relation. What the contract was and what consequences flow from it are both matters of law, and therefore beyond the control of the opinion of witnesses or parties. The offer did not point to any agreement different from that embraced in the letters and telegrams between the parties. There was no attempt to contradict or vary the terms of this agreement, but only an effort to govern its legal effect by the statement of a party. Whatever plaintiff may have thought, the law declares that defendant was plaintiff's agent, and as such was powerless to sell to itself. The law does not concern itself

with any question of injury to the principal, but makes the sweeping assertion that under no circumstances can the agent without the consent of the principal buy the property himself. The power vested in him to sell is limited to third persons. The law writes into the instrument conferring an authority a positive prohibition
57 against the purchase of the property of the agent himself unless the principal assents thereto. See the opinion in this case in 5 N. D., 80; 64 N. W., 114, and cases cited at page 83, 5 N. D., and page 115, 64 N. W. Even though the agent pays more for the property than any one else is willing to pay, or more than it is worth, the purchase by him is without right and may be repudiated by the principal on discovering the fact. The inquiry is never whether the principal has been prejudiced or the agent has made profit out of the purchase of the property. Without regard to either of these questions, the transaction is void, because unauthorized by the principal. It does not differ from any other act of an agent in excess of his authority. It therefore matters not the least whether the plaintiff was governed by the representations of the defendant as to the short crop or the tight money market in fixing the price at which he was willing to sell. The law says upon undisputed facts that the defendant was his agent in making the sale, and that therefore it could not sell to itself.

The question of *ultra vires* has been already discussed in a previous opinion. See 67 N. W., 821. We have nothing to add on that point except that the question appears to us to be immaterial. The plaintiff when it authorized a sale by defendant as its agent did in contemplation of law decline to sell to the agent on the terms agreed or any terms, there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always in contemplation of law is in the attitude of being unwilling to sell to the agent on any terms. Whether the defendant was authorized by the law to act as agent for the plaintiff is therefore of no moment, because, even if we concede this proposition, it still remains true that he had never agreed to a purchase of the notes by the defendant, and hence it follows that defendant's assumption of ownership of them, as though plaintiff had assented to a purchase of them by defendant, constituted a conversion thereof. The recent decision of the Federal Supreme Court cited by counsel for appellant (Bank *vs.* Kennedy, 17 Sup. Ct., 831) does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal on the subject of the
58 authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act and not the act of an unauthorized agent. By its own pleading and admission it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It is urged that inasmuch as the trial court admitted, over objec-

tion, the evidence of the plaintiff as to the value of these notes, the plaintiff is estopped to insist that similar evidence on the part of the defendant is incompetent. Had the trial court permitted the defendant to introduce such evidence and had the defendant been successful in the case, we are inclined to agree with counsel for defendant that plaintiff would not be heard to claim that evidence of the same class which he successfully contended, against objection, was competent when offered by himself was incompetent when offered by his adversary. But the learned trial judge, by refusing to receive defendant's evidence of the same character, in effect ruled that all such evidence was incompetent; and he must be deemed to have changed his former ruling and to have stricken out plaintiff's evidence on this point, for the verdict (directed) by him was for the amount of the presumed value of the notes, with interest, less what had been paid the plaintiff by defendant. The testimony of the plaintiff was ignored by the court. Without it, a conclusive case as to value had been established, no legal evidence to overthrow the statutory presumption as to value having been offered. By ruling that evidence of the same kind offered by defendant was incompetent and by basing his direction of the verdict upon the statutory presumption as to value, so far as the element of value was concerned, the district judge clearly decided that plaintiff's evidence as to value was incompetent, and it is palpable that he disregarded it. While a party may waive his right to object to incompetent evidence by offering and insisting on the reception of incompetent evidence of the same class, despite his antagonist's
59 objection to it, yet the trial court may at any time change its ruling admitting such evidence and direct that it be stricken out. That is what was done by the district court in the case at bar.

We have carefully examined all the other questions presented by counsel for appellant. The length of this opinion forbids a more specific reference to them, in view of the fact that they appear to us to be of little importance and to involve no difficult problems. We are satisfied that there is no prejudicial error in the case, and the judgment is therefore affirmed.

(Signed) GUY C. H. CORLISS,
Chief Justice.
J. M. BARTHOLOMEW,
Associate Justice.
ALFRED WALLIN, *Do.*

STATE OF NORTH DAKOTA:

In the Supreme Court, October Term, 1897.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, N. D., Defendant and Appellant.

Petition for Rehearing.

To the honorable the chief justice and associate justices of the supreme court of the State of North Dakota and to said court:

Your petitioner, The First National Bank of Grand Forks, North Dakota, appellant, respectfully represents to and shows the court:

That upon the hearing and determination of this action upon the appeal submitted at the September, 1897, term of this court, and in the opinion therein filed October 4th, 1897, the court overlooked and misapprehended the record and the law applicable thereto in the following particulars:

I.

This court overlooked and misapprehended the record and the law applicable thereto in relation to the want of power or authority of the cashier of a national bank to bind his bank by contract
60 to assume the duties and responsibilities of an agent for the respondent Anderson to sell the notes and mortgage for respondent to a third person or third parties, and thereunder that appellant's answer admits the writing of the letter of October 7th, 1891, and of no other letter or telegram shown in the record, and that such letter comprised no part of the pretended written contract that the bank would assume and undertake the powers or duties of such agency, and that appellant's brief nowhere admits that any other telegram or letter was written by or with the authority of the bank, and consequently no admission of authority from the bank to its cashier, Titus, to make such pretended contract.

II.

This court apparently has overlooked, or has decided only by reference to a former opinion, the other and independent question whether the appellant bank itself had power under the national bank act, or other statute of the United States prescribing the powers of national banks, to bind itself that it would assume and perform the duties and obligations of an agent for the sale of the notes and mortgage for respondent to a third party or to third parties, and hereunder, and in view of the silence of this court upon that question, and in view of the limitations imposed by the national bank act and other acts of the Congress of the United States and decisions by the circuit court of appeals of the United States for the eighth circuit, your petitioner says that this court has overlooked and misapprehended said question and the law applicable thereto, and has denied a right, privilege, and immunity set up and claimed by ap-

pellant under the Constitution and statutes, to wit, to be exonerated from liability on account of a contract not within the power of a national bank to make or to perform, and which contract and the pretended duties, liabilities, and obligations whereof are *ultra vires*.

Wherefore your petitioner prays the court that a rehearing of and a re-examination of the issues of law arising upon this appeal be granted, and that the court clearly determine and express its opinion and judgment upon the above and foregoing questions of law, and that the opinion in relation to admissions of appellant be corrected to conform to the record now before the court, and
61 that upon such rehearing appellant be adjudged entitled to the above rights, privileges, and immunities, and thereupon the judgment of the court below be reversed.

Dated Grand Forks, North Dakota, October 12th, 1897.

BURKE CORBET,
Attorney for Appellant.

File No. 481.

STATE OF NORTH DAKOTA:

In the Supreme Court.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, Defendant and Appellant.

Appeal from the district court of Grand Forks county.

This action coming on to be heard at the special September, A. D. 1897, term of this court, at the supreme court, in the city of Fargo, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Burke Corbet, for the appellant, and by Phelps & Phelps, for the respondent, and the court having advised thereon and having decided that the judgment herein should be affirmed, and the appellant having applied for a rehearing herein, and his application having been denied, and he having exhausted every remedy in the State courts, and nothing remaining to be done herein but the purely ministerial act of entering judgment of affirmance in the district court, it is now here—

Considered, ordered, and adjudged that the judgment of the district court within and for said Grand Forks county appealed from herein be, and the same is hereby, in all things affirmed. And it is—

Further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court. And it is—

62 & 63 Further considered and adjudged that respondent have

and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated Oct. 13th, 1897.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

A true copy.
Attest:
[SEAL.] R. D. HOSKINS, *Clerk.*

64 STATE OF NORTH DAKOTA:

In the Supreme Court.

ALEXANDER ANDERSON, Plaintiff and Respondent,
vs.
FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA, Defendant and Appellant. } At Law.

Petition for Writ of Error.

And now comes the defendant and appellant herein, The First National Bank of Grand Forks, North Dakota, and says that on or about the 13th day of October, 1897, this court entered judgment herein in favor of the plaintiff and against the defendant, The First National Bank, aforesaid, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant; all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore the defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, and that a supersedeas be allowed upon lodging with the clerk of this court its bond, according to law, therefor.

Dated, etc.

W. E. DODGE,
Attorney for Defendant and Appellant.

65 In the Supreme Court, State of North Dakota.

ANDERSON
vs.
BANK. } At Law.

Assignment of Errors.

The defendant in this action, The First National Bank of Grand Forks, N. D., in connection with its petition for a writ of error,

makes the following assignment of errors which it avers occurred upon the trial and determination of the cause in this the supreme court of the State of North Dakota, to wit:

I.

The court erred in denying defendant's assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the admission of plaintiff's evidence, and wherein this court erroniously ruled and adjudged that the district court did not err in the admission of such evidence, in the following instances, to wit:

(1.) In assignment of errors number one (1), that the district court erred in overruling and denying defendant's objection made at the first offer of evidence on behalf of the plaintiff, wherein defendant objected to the introduction of any evidence on behalf of plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action; which objection was overruled by the district court, and exceptions to such ruling were duly taken, allowed, and preserved, and which ruling was affirmed by this the supreme court of North Dakota, the complaint stating a pretended cause of action which on the face thereof was based upon a pretended contract on the part of the defendant bank which
66 by the statutes of the United States was not within the powers of a national bank to make and upon the face thereof was *ultra vires* and void.

(2.) In assignment of errors number fifty (50), that the district court erred in overruling and denying defendant's objection to Exhibit "E," the letter dated Grand Forks, September 14th, 1891, addressed to Mr. Alex. Anderson, Seattle, Wash., and signed S. S. Titus, Cr., wherein is contained the pretended offer to act as agent in the following words: "If I had a basis to work on, I might find some one who would take the paper. You offered it at $350.00 discount. We offered you a trade at $1,000.00 discount. Now, if you will make it $700.00 or $800.00 and allow us a small commission, I will try and place the paper for you;" which ruling by the district court was affirmed by this the supreme court of North Dakota, although the contract sought to be established thereby was one which, under the national bank act, a statute of the United States, was not within the powers of a national bank to make or to perform and was *ultra vires* and void, and under which statute it was not within the powers of the cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgage to third persons, and the act of the cashier in writing such letter was *ultra vires* and void.

(3.) In assignment of errors number seventy-four (74), concerning like objections to the introduction in evidence of the same letter as Exhibit Eleven (11) upon identification thereof by the witness S. S. Titus.

(4.) In assignment of error number ninety (90), wherein the district court erred in overruling and denying defendant's motion to strike out the letters of September 14th, 1891, being Exhibit "E,"

and also identified as Exhibit "11," as above stated, on the ground that it was *ultra vires*, and also not shown to have been the act of the defendant bank, which erroneous ruling was affirmed by this the supreme court of North Dakota, although the contract of agency held by this court to be proved to be established thereby was, as the contract of a national bank, *ultra vires* under the national bank act, and the act of the cashier in undertaking to bind his bank by such contract was *ultra vires* under said act.

67 (5.) In assignment of errors number one hundred and forty-seven (147), concerning the admission of said letter, Exhibit "E," admitted over defendant's objections and the admission adjudged to be proper by this court.

(6.) In assignment of errors number one hundred and forty-five (145), wherein defendant assigned error in admitting evidence of the pretended telegram of October 3rd, 1891, as follows: "Did you receive our letter September 14? Wire us your best offer, so we can advise a party who said he would hold his money until we hear from you. First National Bank"—upon the grounds that there was no evidence of the identity or authority of the writer or sender, if any, and the agency, if established, was *ultra vires*, and the act of any officer contracting that the bank would act as agent would be *ultra vires;* which express claim for immunity against liability, both on account of *ultra vires* acts of the cashier and also on account of *ultra vires* contracts by the bank itself, was by this supreme court of North Dakota erroneously denied.

II.

The court erred in denying defendant's assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the rejection of evidence offered by defendant, which erroneous rulings were affirmed and sustained by this the supreme court of North Dakota, which court erroneously denied defendant a reversal of the judgment of said district court and erroneously affirmed said judgment, and erroneously rendered and entered judgment against defendant in said action notwithstanding such errors by the court below, and that the said erroneous rejection of evidence was in the following instances, to wit:

(1.) In assignment of errors number one hundred and twenty-three (123), wherein J. Walker Smith, president of the board of directors of the defendant bank, was produced, sworn, and examined as a witness in behalf of defendant and shown competent to testify to the facts, and was asked on behalf of defendant, "Did the board of directors of the defendant bank in any way ever authorize Mr. Titus to act for and in behalf of the bank, constituting

68 the bank thereby the agent of the plaintiff for the sale of the notes in litigation?" which question was objected to by plaintiff on the ground that it was incompetent, irrelevant, and immaterial; which objection was erroneously sustained by the district court, and exceptions to such ruling were duly taken, allowed, and preserved and duly submitted to this the supreme court of the State

of North Dakota, wherein such ruling was erroniously affirmed and judgment rendered against defendant notwithstanding such error, though under the statutes of the United States the cashier, Titus, could not render defendant liable by his acts without such express authority, and any act on the part of such cashier attempting to contract for or on behalf of the bank that it would assume or undertake any of the duties, obligations, or liabilities of plaintiff's agent for the sale of said notes to third parties, if established, was *ultra vires* and void.

(2.) In assignments of errors number one hundred and twenty-four, wherein defendant offered to prove by said witness, J. Walker Smith, that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the defendant bank, constituting the bank the agent of plaintiff for the sale of the seven promissory notes in litigation; which evidence the district court erroniously excluded upon plaintiff's objection that it was irrelevant, incompetent, and immaterial; to which ruling exceptions were duly taken, allowed, and preserved and duly submitted to this the supreme court of North Dakota, wherein said ruling was erroniously affirmed and judgment has been erroniously rendered and entered against defendant notwithstanding such error, although it manifestly appeared that such ruling was in conflict with the statutes of the United States, and denied to defendant a right, privilege, and immunity claimed by defendant under such statutes that it should not be liable for *ultra vires* acts of its cashier.

(3.) In assignment of errors number one hundred and twenty-five (125), wherein defendant offered to prove by said witness, J. Walker Smith, that the board of directors of the defendant bank never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, the agent of plaintiff for the sale of the seven promissory notes, which evidence was erroniously
69 excluded by the district court upon the same objections, and such ruling, duly presented and submitted to this the supreme court of North Dakota, was erroniously affirmed and judgment erroniously entered, though such ruling erroniously denied a right, privilege, and immunity expressly claimed by defendant under the national bank act, a statute of the United States.

(4.) In assignment of error number one hundred and fifty-four (154), wherein defendant assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor *was* any steps taken whereby the defendant bank could engage to, act as agent for the sale of these notes or otherwise, because any contract to that effect is *ultra vires* and not within the implied or customary powers of officers of a national bank; which claim for immunity from *ultra vires* acts of officers and from liability on account of *ultra vires* contracts by national banks themselves thus expressly set up was erroniously denied by this the supreme court of North Dakota.

III.

The supreme court of the State of North Dakota erred in denying to defendant the immunity conferred upon defendant as a national bank by the statutes of the United States, that it should not be liable on account of *ultra vires* acts of its cashier, and not even by *ultra vires* contracts by the bank itself; which immunity was expressly claimed by defendant in the district court wherein the case was tried, and in this the supreme court of said State, when brought here upon appeal, and in the following instances, to wit:

(1.) In assignment of errors number one hundred and fifty-six (156), wherein defendant assigned as error that the district court erred in directing a verdict for plaintiff for the amount directed or for any amount; which ruling was affirmed by this the supreme court of North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an *ultra vires* contract, and was supported, if at all, only by evidence of such *ultra vires* contract made by the defendant's cashier without authority.

(2.) In assignment of error- number third (III) of the 70 & 71 assignments of errors annexed to and written out at length at the close of defendant's brief, wherein defendant assigned error as follows: "Appellant" (this defendant) "further says there was manifest error" (by the district court) "in rendering judgment against appellant in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States against liability on account of *ultra vires* acts of their officers and *ultra vires* contracts of the banks themselves;" which erroneous judgment was erroniously affirmed by this the supreme court of North Dakota, notwithstanding such claim and right to immunity under said statute of the United States.

IV.

The supreme court of North Dakota manifestly erred in denying to defendant, by giving judgment against it, the immunity claimed and set out by defendant under the statutes of the United States against liability on account of *ultra vires* acts of its cashier and *ultra vires* contracts by the bank itself, whereon alone judgment was demanded and rendered.

V.

The supreme court of North Dakota erred in denying defendant's petition for a rehearing upon the ground that such court had overlooked and disregarded the record and the law applicable thereto in relation to the want of power or authority of the cashier of a national bank to bind his bank by contract to assume the duties and responsibilities of an agent for plaintiff to sell the notes and mortgage for plaintiff to a third person; also that this court overlooked and disregarded the record and the law applicable thereto in relation to the power of a national bank itself in any manner by contract to assume the duties and responsibilities of such agent, and

had thereby denied defendant a right, privilege, and immunity claimed by it under the statutes of the United States.

Dated Grand Forks, North Dakota, Oct. 18, 1897.

BURKE CORBET,
Attorney for Defendant, First National Bank of Grand Forks.

72 Upon the foregoing record and the petition for writ of error an order allowing writ of error was granted, the writ of error duly issued, supersedeas bond was duly filed, citation was duly served, and the writ of error and returns thereto have been duly filed in the office of the clerk of the Supreme Court of the United States under the title first above set out.

Plaintiff in error submits the assignments of error attached to and presented with its petition for writ of error, and found on pages 65 to 70 of this statement, as its statement of the errors on which it will rely in the further proceedings in this case and the foregoing portions of the record in support thereof.

Dated Grand Forks, North Dakota, March 28th, 1898.

W. E. DODGE,
BURKE CORBET,
Attorneys for Plaintiff in Error.

W. E. Dodge, Minneapolis, Minn.
Burke Corbet, Grand Forks, N. D.

73 Supreme Court of the United States, October Term, 1897.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 557. Notice.

To Henry W. Phelps and Phelps & Phelps, attorneys for defendant in error:

Take notice that Burke Corbet, of Grand Forks, North Dakota, will file his præcipe for appearance in Supreme Court, asking that his appearance be entered as attorney for the plaintiff in error in the above-entitled action.

Dated Grand Forks, North Dakota, March 28th, 1898.

BURKE CORBET,
Attorney for Plaintiff in Error.

74 In the Supreme Court of the United States, October Term, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, N. D., Plaintiff in Error,
vs.
ALEXANDER ANDERSON, Defendant in Error.
} No. 223.

The above-named parties, by their respective counsel, hereby stipulate that the printed record for the above-entitled cause be pre-

pared by the clerk of the Supreme Court of the United States by using as the copy therefor the parts of the record hereunto annexed.

And we further stipulate that the record thus to be printed be the record to be used on the determination of the motion to dismiss and affirm heretofore submitted by the defendant in error, and if said motion be denied that the same record is to be used on the merits. This stipulation, however, is not intended to preclude the consideration by the court of the reported decisions of the supreme court of the State of North Dakota in the case of Alexander Anderson against The First National Bank of Grand Forks, N. D., out of which the present cause arose, reported in 59 N. W. Rep., 1029; 64 N. W. Rep., 114, and 67 N. W. Rep., 821, as well as in 72 N. W. Rep., 916.

BURKE CORBET,
Attorney for Plaintiff in Error.
HENRY W. PHELPS,
Attorney for Defendant in Error.

75 [Endorsed:] Case No. 16,770. Supreme Court U. S., October term, 1898. Term No., 223. The First National Bank of Grand Forks, North Dakota, pl'ff in error, *vs.* Alexander Anderson. Agreed record. Office Supreme Court U. S. Filed Aug. 30, 1898. James H. McKenney, clerk.